No. 09A648
Title: Dennis Hollingsworth, et al., Applicants
v.
Kristin M. Perry, et al.

Docketed:
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (10-70063)

Date	Proceedings and Orders
Jan 9 2010	Application (09A648) for a stay, submitted to Justice Kennedy.
Jan 9 2010	Response to application (09A648) requested by Justice Kennedy, due Sunday, January 10, 2010, by noon Eastern Time.
Jan 10 2010	Response to application from respondent Kristin M. Perry, et al. filed.
Jan 10 2010	Response to application from respondent The Media Coalition filed.
Jan 11 2010	Application (09A648) referred to the Court.
Jan 11 2010	Upon consideration of the application for stay presented to Justice Kennedy and by him referred to the Court, it is ordered that the order of the United States District Court for the Northern District of California, case No. 3:09-cv-02292, permitting real-time streaming is stayed except as it permits streaming to other rooms within the confines of the courthouse in which the trial is to be held. Any additional order permitting broadcast of the proceedings is also stayed pending further order of this Court. To permit further consideration in this Court, this order will remain in effect until Wednesday, January 13, 2010, at 4 p.m. eastern time. Justice Breyer dissents.
Jan 11 2010	Supplemental appendix of respondent The Media Coalition filed.
Jan 12 2010	Supplemental appendix of respondent Kristin M. Perry, et al. filed.
Jan 12 2010	Supplemental brief of applicant Dennis Hollingsworth, et al. filed.
Jan 13 2010	Application (09A648) granted by the Court. Opinion per curiam. Breyer, J., filed a dissenting opinion in which Stevens, Ginsburg, and Sotomayor, JJ., joined.

No. 10-___

IN THE UNITED STATES SUPREME COURT

IN RE: DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANNSON, AND PROTECT-MARRIAGE.COM—YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

DENNIS HOLLINGSWORTH, et al., *Petitioners*

v.

KRISTEN M. PERRY, SANDRA B. STIER, PAUL K. KATAMI, JEFFREY J. ZARRILLO, CITY AND COUNTY OF SAN FRANCISCO, NON-PARTY THE MEDIA COALITION, ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, EDMUND G. BROWN, JR., in his official capacity as Attorney General of California, MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics, LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda, DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, and HAK-SHING WILLIAM TAM, *Respondents*.

ON APPLICATION FOR IMMEDIATE STAY OF THE DISTRICT COURT'S ORDER PERMITTING PUBLIC BROADCAST OF TRIAL PROCEEDINGS

DIRECTED TO HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Andrew P. Pugno
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Drive, Suite 100
Folsom, California 95630
(916) 608-3065; (916) 608-3066 Fax

Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020; (480) 444-0028 Fax

Charles J. Cooper
Counsel of Record
Michael W. Kirk
Jesse Panuccio
COOPER AND KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600; (202) 220-9601 Fax

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 2

STATEMENT 4

STANDARDS FOR GRANTING THE STAY 10

REASONS FOR GRANTING THE STAY 11

I. Absent Immediate Stay, Petitioners Have No Other Means of Relief. 12

II. The Full Court Would Very Likely Grant a Writ of Ceriorari or a Writ of Mandamus and Vacate the Order Designating This Case for Public Broadcast 18

A. The Purported Revision of Local Rule 77-3 19

B. Ninth Circuit Judicial Council Policy 23

C. The Lack of Guidelines Governing the Pilot Program 24

D. Public Broadcast of the Trial in This Case Would Violate Petitioners' Due Process Right to a Fair Trial. 24

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Chandler v. Florida, 449 U.S. 560 (1981) 25

Cheney v. United States Dist. Court for the Dist. of Columbia, 542 U.S. 367 (2004). 11

Deavers v. United States, 483 U.S. 1301 (1987). 10

Estes v. Texas, 381 U.S. 532 (1965). 12, 13, 24

In re Compiaint Against Dist. Judge Billy Joe McDade, No. 07-09-90083 (7th Cir. Sept. 28, 2009) 18

In re Sony BMG Music Entertainment, 564 F.3d 1 (1st Cir. 2009). 17, 18, 21

INS Legalization Assistance Project of Los Angeles County Federation of Labor, 510 U.S. 1301 (1993) 10

Jinro Am., Inc. v. Secure Inv., Inc., 266 F.3d 993 (9th Cir. 2001) 24

Khanh Phuong Nguyen v. United States, 539 U.S. 69 (2003). 12

Miner v. Atlass, 363 U.S. 641 (1960) 20

NRDC v. Evans, 316 F.3d 904 (9th Cir. 2003) 22

Petry v. Block, 737 F.2d 1193 (D.C. Cir. 1984) 20

Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479 (9th Cir. 1992) 20

Russell v. Hug, 275 F.3d 812 (9th Cir. 2002) 23

San Diegans for the Mt. Soledad National War Memorial v. Paulson, 548 U.S. 1301 (2006) 10

United States v. Carr, 2006 U.S. Dist. LEXIS 74757 (E.D. Cal. 2006) 21

United States v. Edwards, 785 F.2d 1293 (5th Cir. 1986) 17

United States v. Hastings, 695 F.2d 1278 (11th Cir. 1983) 18

United States v. Hernandez, 251 F.3d 1247 (9th Cir. 2001) 19

United States v. Klubock, 832 F.2d 664 (1st Cir. 1987) 21

United States v. Terry, 11 F.3d 110 (9th Cir. 1993) 21

United States v. Yonkers Bd. of Education, 747 F.2d 111 (2d Cir. 1984) 18

Weil v. Neary, 278 U.S. 160, 169 (1929) 18

Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 16 (2d Cir. 1984) 17

Statutes

5 U.S.C. § 553(b)(B) 22

28 U.S.C. § 332(d) 3, 23

28 U.S.C. § 2071 ..... 3, 19, 21

28 U.S.C. § 2077(b) 19

Rules

SUP. CT. R 10 (a) 10

FED. R. CIV. P. 83 ..... 19, 20

N.D. Cal. L.R. 77-3 ..... 9, 19

N.D. Cal L.R. 83-1 19

N.D. Cal L.R. 83-3(a) 19

Constitutional Provisions

CAL. CONST. art. I, § 7.5 2

Other Authorities

Notes of Advisory Committee on 1985 Amendments to FED. R. CIV. P. 83 20

Thomas M. Messner, *The Price of Prop 8*, Heritage Foundation, *available at* www.heritage.org/Research/Family/bg2328.cfm 15

http://www.youtube.com/watch?v=hcKJEHrvwDI 17

APPLICATION OF DENNIS HOLLINGSWORTH, GAIL KNIGHT, MARTIN GUTIERREZ, MARK JANSSON, AND PROTECTMARRIAGE.COM TO STAY THE DISTRICT COURT'S ORDER PERMITTING PUBLIC BROADCAST OF A FEDERAL DISTRICT COURT PROCEEDING

To the Honorable Anthony M. Kennedy, Associate Justice of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioners[1] respectfully apply for an immediate stay, to halt the broadcast on YouTube of the trial in this case commencing January 11, 2010, pending final resolution of a forthcoming petition for a writ of certiorari to review the judgment of the Court of Appeals denying Petitioners' mandamus petition or in the alternative, a petition of mandamus to review the order dated January 7, 2010, entered by the District Court for the Northern District of California, designating this case for public broadcast on YouTube as part of the Ninth Circuit's new "pilot program." If the district court proceeds with its unlawful plan to broadcast the trial proceedings in this case on YouTube, Petitioners will suffer irreparable harm as their fundamental right to a fair trial will be infringed.

Petitioners have attempted to halt the broadcast of the trial proceedings by requesting a stay from the District Court for the Northern District of California and a writ of mandamus from the Court of Appeals for the Ninth Circuit. The court of appeals denied the petition for a writ of mandamus yesterday, January 8, 2010, *see* Exhibit A, and the district court has not ruled on the motion for stay. Because the trial is set to begin on the morning of Monday, January 11, 2010, Petitioners request that this Court immediately stay the district court's order permitting the proceedings in this case to be broadcast.

---

[1] Petitioners are not a corporation but a primarily formed ballot committee under California Law. *See* CAL. GOV. CODE §§ 82013 & 82047.5.

INTRODUCTION

This application arises in a case presenting a federal constitutional challenge to Prop 8, which provides that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. Although the case concerns a question of law that can be answered solely by resort to controlling precedent and, if necessary, legislative facts, the district court has ordered a full-scale, multi-week trial. Dozens of witnesses are expected to testify on a range of topics related to the divisive issues of same-sex marriage and sexual orientation in general. On January 7, 2010, the district court formally notified the parties that, subject to the approval of the Chief Judge of the Ninth Circuit, the trial would be broadcast daily on YouTube several hours after the completion of the day's proceedings. *See* Notice to Parties (Jan. 7, 2010) (CA App. (attached as Exhibit B), Ex. 1); Tr. of Hr'g of Jan. 6, 2010 (CA App, Ex. 2) at 6, 46. Although there is no record that Chief Judge Kozinski has yet acted, Petitioners feel compelled to seek relief now to afford this Court adequate time to rule before the trial begins Monday morning. On January 8, 2010, Petitioners filed petition for mandamus in the Ninth Circuit, but that court denied the petition the same day. *See* Exhibit A.

The district court's order is contrary to the long-established policy of the Judicial Conference of the United States—as well as the policies of both the Northern District of California and the Ninth Circuit in effect at least until late December 2009. The district court issued the order pursuant to (i) a purported revision, made on the eve of trial, to the district court's Local Rule 77-3, which had previously prohibited public broadcast, and (ii) a press release by the Ninth Circuit Judicial Council announcing a "pilot program" permitting broadcasting of district court proceedings within the Circuit. Both policies appear to have been

changed with great haste and procedural irregularity solely to ensure that this case would be publicly broadcast.

Congress has mandated that the public be afforded notice and the opportunity to comment before a district court revises a local rule or a circuit judicial council revises a practice or procedure. *See* 28 U.S.C. § 2071(b) & (c)(1); 28 U.S.C. § 332(d). Nonetheless, the Ninth Circuit Judicial Council's announcement failed entirely to comply with this statutory mandate, while the Northern District first offered a belated, truncated opportunity to comment that foreclosed meaningful consideration of the public's views and then at the last minute shifted its rationale in an attempt to take refuge in a statutory exception for rule changes prompted by an "immediate need." Neither process produced carefully considered or detailed guidelines about how a pilot program allowing public broadcast will operate or how it will address the many serious concerns this practice raises.

The questions of whether and how to publicly broadcast trial proceedings are weighty and have for years been the subject of study, debate, proposed legislation, and testimony from dozens of federal judges, including members of this Court. For fifteen years the Judicial Conference of the United States has "consistently" and repeatedly voiced its strong opposition because "camera coverage can do irreparable harm to a citizen's right to a fair and impartial trial." *Cameras in the Courtroom: Hr'g Before the S. Comm. on the Judiciary*, 109th Cong. (Nov. 9, 2005) (statement of Hon. Diarmuid O'Scannlain for the Judicial Conference of the United States) (CA App., Ex. 3) ("Testimony of Judge O'Scannlain") at 40; *see also, e.g.*, Letter from James C. Duff (July 23, 2009) (CA App., Ex. 4) ("Duff Letter") at 2.

Here, the district court, because it has before it a high-profile case, has decided to short-circuit the national debate on this issue, to change its controlling rules in a matter of days through

a process that violates the letter and spirit of the law, and to broadcast on YouTube a trial that has the potential to become a media circus. It has done so without addressing the many concerns cited by the Judicial Conference and the parties in this case.

Indeed, the specific concerns underlying the Judicial Conference's firm opposition are present in spades here. The record is already replete with evidence showing that any publicizing of support for Prop 8 has inevitably led to harassment, economic reprisal, threats, and even physical violence. In this atmosphere, witnesses are understandably quite distressed at the prospect of their testimony being broadcast worldwide on YouTube. Whatever truth there may be to the notion that televising trials will better educate the public about the federal judiciary, "increased public education cannot be allowed to interfere with the judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases." Testimony of Judge O'Scannlain, CA App., Ex. 3 at 48.

STATEMENT

Petitioners intervened to defend the amendment to California's constitution because the State declined to do so. When they intervened in June 2009, the long-standing policy of the Ninth Circuit Judicial Council flatly prohibited public broadcast of district court proceedings. *See* Resolution of the Ninth Circuit Judicial Conference (July 2007) (CA App., Ex. 5). Likewise, the Northern District of California's Local Rule 77-3 stated that "the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited." *See* CA App., Ex. 6; *see also* N.D. Cal. Gen. Order No. 58 (CA App., Ex. 7), ¶ III (adopting Judicial Conference's policy against broadcasting district court proceedings).

The Judicial Conference of the United States adopted its current policy in 1996. *See* JCUS-SEP 96, p. 54, *available at* www.uscourts.gov/judconf/96-Sep.pdf. The policy is based upon the potentially negative impact that the public broadcast of trial court proceedings could have on the administration of justice. After an extensive, multi-year study of the issue by the Federal Judicial Center ("FJC"), the Judicial Conference, in 1994, rejected proposals for public broadcast of trial court proceedings. *See* JCUS-SEP 94, pp. 46-47, *available at* www.uscourts.gov/judconf/94-Sep.pdf. "Based upon the data presented, a majority of the Conference concluded that the intimidating effect of cameras on some witnesses and jurors was cause for concern, and the Conference declined to ... to expand camera coverage in civil proceedings." *Id.*

In July 2007, the Ninth Circuit Judicial Conference adopted a resolution recommending that the Judicial Conference of the United States change its policy to permit the broadcast of civil, non-jury trials. *See* CA App., Ex. 6. The Ninth Circuit Judicial Conference also recommended that, "to the extent permitted by Judicial Conference [of the United States] procedures, this Circuit should adopt a Rule that would allow the photographing, recording, and broadcasting of non-jury, civil proceedings before the District Courts in the Ninth Circuit." *Id.*

Despite these recommendations, the Ninth Circuit Judicial Council took no action for nearly two years. In the interim, "[t]he Ninth Circuit Judicial Council considered the resolution at a number of meetings following the 2007 Judicial Conference but deferred action to await possible developments at the national level." Letter from Cathy A. Catterson (May 7, 2009) (CA App., Ex. 8). Finally, in May 2009, for reasons left unstated, the Ninth Circuit Judicial Council decided "that it is appropriate to forward [to the United States Judicial Conference] the [2007]

resolution now and ask that it [be] considered by [the Committee on Court Administration and Case Management] at its June meeting." *Id.*

The Judicial Conference of the United States has not retreated from its policy against the broadcast of district court proceedings. Indeed, as recently as July 2009 the Judicial Conference forcefully reiterated to Congress its concern that broadcasting would interfere with a fair trial. The Judicial Conference emphasized, *inter alia*, its considered judgment that "[t]elevision cameras can intimidate litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding and are involved in it through no action of their own. Witnesses might refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast." Duff Letter (CA App., Ex. 4) at 2.

On September 25, 2009, despite the local and national policies barring public broadcast of proceedings in the Northern District, the district court informed the parties that it had received inquiries about publicly broadcasting the trial and asked the parties for their position. Tr. of Hr'g of Sept. 25, 2009 (CA App., Ex. 9) at 70. The court acknowledged that "[t]here are, of course, Judicial Conference positions on this," but stated that "[t]his is all in flux." *Id.* at 72. Plaintiffs, Plaintiff-Intervenors, and the Attorney General (all of whom seek invalidation of Prop 8) stated their support for publicly broadcasting the trial. *See* Doc. No. 215 (CA App., Ex.10). Petitioners opposed, explaining that it would violate the United States Judicial Conference's policy and would threaten the fairness of the trial. *See* Doc. No. 218 (CA App., Ex. 11).

Neither the Ninth Circuit Judicial Council, nor the Northern District as a whole, nor the trial court in this case took any further public action with regard to this issue between September 25 and December 16, the date of the final pretrial conference. However, the presiding judge later informed the parties (on January 6) that he sat on a Judicial Council committee of three judges

created by Chief Judge Kozinski on October 22 "to evaluate the possibility of adopting a Ninth Circuit rule" regarding broadcast of district court proceedings, and he acknowledged that this "case was very much in mind at that time because it had come to prominence then and was thought to be an ideal candidate for consideration." Tr. of Hr'g of Jan. 6, 2009 (CA App., Ex. 2) at 43. Neither the parties nor the public received any notice or opportunity to comment on this proposed policy change.

At the final pre-trial conference, the court announced that although public broadcast was "not permitted" under "current Ninth Circuit policy and rules" or the Northern District's local rules, the Ninth Circuit Judicial Council was considering implementation of a pilot program permitting broadcast of nonjury civil cases. Tr. of Hr'g of Dec. 16, 2009, at 10 (CA App., Ex. 12). The court explained that its "understanding [was] that a proposal to implement that is pending before the Judicial Council of the Ninth Circuit, and may very well be enacted in the very near future," though the court did not yet "have a green light for it." *Id.*

The next day, December 17, the Ninth Circuit Judicial Council issued a "News Release" announcing it "ha[d] approved, on an experimental basis, the limited use of cameras in federal district courts within the circuit." *See* CA App., Ex. 13. The press release provided no details as to how the pilot program would be implemented other than that "[c]ases to be considered for the pilot program will be selected by the chief judge of the district court in consultation with the chief circuit judge." *Id.* No Circuit rule or order permitting the broadcast of trials has been noticed, opened for public comment, or promulgated, nor has the Judicial Council issued any policies or procedures to govern the pilot program.

On December 21, a coalition of media companies (the "Media Coalition") sought leave to televise the trial. Doc. No. 313. On December 23, the Northern District of California posted on

its website "public notice" that the court "has approved a revision of Civil Local Rule 77-3, effective December 22, 2009." *See* CA App., Ex. 14 (screenshot of the webpage on Dec. 29, 2009). The purported amendment carved out an exception to the ban on public broadcasting of proceedings, authorizing "a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom" to allow "the taking of photographs, public broadcasting or televising, or recording for [the] purpose[]" of "participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit." *Id.*

On December 28 and 29, Petitioners opposed the Media Coalition's request, explaining that any change in Ninth Circuit policy or local rules regarding broadcast of district court proceedings would require a sufficient public notice and comment period. Doc. Nos. 324, 326 (CA App., Exs. 15 & 16). Petitioners reiterated that this case implicates the precise concerns that animated the Judicial Conference's policy against broadcast of district court proceedings. Doc. No. 324 at 6-7.

On December 30, the district court set a hearing for January 6, 2010, on the issue of broadcasting the trial. Later that day, the court informed the parties that "in light of the recent change to the Ninth Circuit Judicial Council's policy regarding cameras in district courts and the subsequent amendment of Civil LR 77-3 to conform with Ninth Circuit policy, the court is considering seeking approval from Chief Judge Kozinski to record or webcast the January 6 hearing." Doc. No. 332 at 2. The court ordered that any objections be filed by January 4. *Id.*

In the late afternoon on New Year's Eve, the Northern District removed from its website the posting announcing that it had "approved a revision of Civil Local Rule 77-3, effective December 22, 2009." In its place, the court put up an announcement of a "*proposed* revision of Civil Local Rule 77-3," which it had "approved for public comment." CA App., Ex. 17

(emphasis added). Any comments were to be submitted by January 8, 2010—the Friday before the trial scheduled to begin Monday, January 11. *Id.*

On January 4, 2010, Petitioners objected to public broadcast of the January 6 hearing for the reasons previously stated. Doc. No. 336 (CA App., Ex. 18). Petitioners also explained that pursuant to the court's New Year's Eve announcement, it no longer appeared that the purported amendment to Local Rule 77-3 was operative. *Id.*

Later on January 4, the Northern District removed from its website the posting announcing the "proposed" revision of Rule 77-3 and replaced it with a notice announcing that the court had approved the revision "effective December 22, 2009." CA App., Ex 19. The notice further stated that "[t]he revised rule was adopted pursuant to the 'immediate need' provision of Title 28 Section 2071(e)." *Id.*

On January 6, the court held a hearing that was recorded on video over Petitioners' objections, for later posting on YouTube. The court announced that the live broadcast of the trial would go not only to the overflow courtroom in the courthouse, but also to the Ninth Circuit's San Francisco courthouse and courthouses in Seattle, Portland, Pasadena, and Chicago. Tr. of Hr'g of Jan. 6, 2009 (CA App., Ex. 2) at 16-17. The court further stated that this case was appropriate for public broadcast and that if Chief Judge Kozinski approved, the trial would be recorded and broadcast beginning Monday January 11, 2010. *Id.* at 46. A court technician explained to the parties that proceedings would be recorded using three cameras and the resulting broadcast would then be uploaded for posting on YouTube, with a delay due to the website's processing requirements. *Id.* at 4, 6. On January 7, the district court formally notified the parties that, subject to the approval of the Chief Judge of the Ninth Circuit, the trial would be broadcast

daily on YouTube according to the procedures described during the previous day's hearing. *See* Notice to Parties (Jan. 7, 2010) (CA App., Ex. 1).

Yesterday, Petitioners moved the district court for a stay of its order directing that the trial proceedings in this case would be broadcast. *See* Doc. No. 371. Petitioners simultaneously petitioned the court of appeals for a writ of mandamus or prohibition barring the district court from broadcasting the trial. The district court has not yet ruled on the stay motion, but the court of appeals denied the petition last night in a terse order stating that "Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus." *See* Exhibit A.

STANDARDS FOR GRANTING THE STAY

"The standards for granting a stay pending disposition of a petition for certiorari are well settled. A Circuit Justice is required to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Deaver v. United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers) (quotation marks omitted); *see also San Diegans for the Mt. Soledad National War Memorial*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) ("a Circuit Justice must 'try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.' " (quoting *INS Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers)).

In deciding whether to grant certiorari, the Court considers not only whether the decision of the lower court conflicts with the decision of this Court or a coordinate court, but also whether

the ruling "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a); *see Khanh Phuong Nguyen v. United States*, 539 U.S. 69, 73-74 (2003) (exercising "supervisory power" to grant certiorari where Court of Appeals for the Ninth Circuit allowed non-Article III judge to sit on panel).

Presumably, similar standards apply in considering whether to grant an application for a stay pending the filing and disposition of a petition for mandamus. Thus, if the Circuit Justice concludes that four Justices are likely to vote to issue the writ, that the Petitioner will suffer irreparable harm absent the stay, and that the "stay equities" favor issuance of the writ, a stay should be granted. This Court requires that three conditions be satisfied before a writ of mandamus may issue:

> First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires,"—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy "'the burden of showing that [his] right to issuance of the writ is "clear and indisputable."'" Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. These hurdles, however demanding, are not insuperable.

Cheney v. United States District Court for the District of Columbia, 542 U.S. 367, 380-81 (2004) (citation omitted).

REASONS FOR GRANTING THE STAY

This case presents a compelling need for a stay because the proceedings below have departed far from the usual course of judicial proceedings. Whether to broadcast trial court proceedings, especially in controversial, high-profile cases such as this, is an issue of surpassing national significance. The district court's decision to publicly broadcast the trial proceedings in this case is not only in the teeth of the long-standing policy of the Judicial Conference of the

United States, of the policy of nearly every other federal jurisdiction, and of views expressed by several Members of this Court, but it is also the result of an unlawful process used to ensure that the proceedings in this particular case would be broadcast, regardless of the consequences. If that were not reason enough to stay the district court's order to broadcast the trial proceedings, the fact that that order will cause Petitioners and many witnesses irreparable harm—and indeed will undermine Petitioners' fundamental constitutional right to a fair trial—compels intervention. Unless the district court's order permitting broadcast are stayed immediately, later review by this Court will be effectively moot.

I. Absent Immediate Stay, Petitioners Have No Other Means of Relief.

Appeal following a televised trial cannot remedy the harm flowing from the broadcast. Many of the likely adverse effects of broadcasting this trial—harassment of witnesses, threats to the safety and security of trial participants, unnecessary public exposure and ridicule of trial participants—cannot be corrected on appeal. "[D]ecades of experience and study," including the FJC study of a multi-year, multi-district pilot program, have demonstrated a variety of harms that arise from public broadcast of district court proceedings, leading the Judicial Conference of the United States to "consistently" conclude "that camera coverage can do *irreparable* harm to a citizen's right to a fair and impartial trial." Testimony of Judge O'Scannlain (CA App., Ex. 3) at 40 (emphasis added); Duff Letter (CA App., Ex. 4) at 1.[2]

---

[2] *See also Cameras in the Courtroom, The "Sunshine in the Courtroom Act of 2007," H.R. 2128, Hr'g Before the H. Judiciary Comm.* (Sept. 27, 2007) (statement of Hon. John R. Tunheim for the Judicial Conference of the United States) ("camera coverage can do irreparable harm to a citizen's right to a fair and impartial trial") (CA App., Ex. 20); Testimony of Judge Becker (CA App., Ex. 21) (public broadcast of district court proceedings "can result in real and irreparable harm"). The United States Department of Justice—the federal courts' most frequent litigant—also opposes broadcasting district court proceedings. *See, e.g., Cameras in the Courtroom, The "Sunshine in the Courtroom Act of 2007," Hr. 2128, Hr'g Before the H.*

(i) *Effect on Witnesses*. This Court has long recognized that "[t]he impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable." *Estes v. Texas*, 381 U.S. 532, 547 (1965). The *Estes* Court concisely summarized many of the potential adverse effects on witnesses:

> Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and "cranks" might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot "prove" the existence of such factors. Yet we all know from experience that they exist.

Id.; *see also id.* at 591 (Harlan, J., concurring).

Although *Estes* involved a criminal trial, the Judicial Conference of the United States has recognized that its insights apply equally to civil proceedings. The FJC study of its three-year pilot program found, *inter alia*, that "64 percent of the participating trial judges and 40 percent of the participating attorneys reported that at least to some extent cameras make witnesses more nervous than they otherwise would be" and that "46 percent of the trial judges believed that at least to some extent cameras make witnesses less willing to appear in court." Testimony of Judge Becker (CA App., Ex. 21) at 1-2. Based on these results, the Judicial Conference has repeatedly and consistently concluded that a witness "will often act differently when he or she knows, or even believes that thousands of people are watching and listening to the story." *Id.*; *see also* Duff Ltr. (CA App., Ex. 4) at 2 ("the presence of cameras in a trial court will encourage some participants to become more dramatic, to pontificate about their personal views, to promote commercial interests to a national audience, or to lengthen their appearance on camera").

Judiciary Comm. (Sept. 27, 2007) (statement of John C. Richter for the Dep't of Justice) (CA App., Ex. 22).

Most troubling, public broadcast "can intimidate ... witnesses," who might "refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast." Duff Letter (CA App., Ex. 4) at 2; *see also Estes*, 381 U.S. at 591 (Harlan, J., concurring) ("there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a 'hidden audience' of unknown but large dimensions"); Testimony of Judge O'Scannlain (CA App., Ex. 3) at 44. Further, the Judicial Conference has found these "disquieting" insights likely to be far more pervasive and problematic in "truly high-profile cases," like this one. Testimony of Judge Becker (CA App., Ex. 21).[3]

Plaintiffs contended below that any concerns a particular witness might have can be addressed by the district court's discretion to bar public broadcast of specific testimony or "control the format and timing of all broadcast transmissions." Doc. No. 327 at 3. This argument fails for several reasons. First, any control the judge exercises over the format and timing of the broadcast is illusory, for once the video is released, it could easily be altered and disseminated widely by those with modest technical skill and an agenda. Second, barring public broadcast of a particular witness, or blurring his or her face or voice, only serves to shine an even brighter spotlight on that particular witness. As Judge Becker observed on behalf of the Judicial Conference, "[p]roviding [a witness] with the choice whether to testify in the open or blur their image and voice would be cold comfort indeed." CA App., Ex. 21 at 2. Third, Plaintiffs' contention ignores that the effect of public broadcast is a two-edged sword: some witnesses will

[3] The Judicial Conference has also repeatedly expressed concerns about the effect of public broadcast on witness privacy. *See* Testimony of Judge O'Scannlain (CA App., Ex. 3) at 54-55; Testimony of Judge Becker (CA App., Ex. 21) at 8-9; Duff Letter (CA App., Ex. 4) at 2.

shy away from cameras, others will crave the spotlight and shade their testimony for dramatic effect. A trial judge cannot determine in advance whether a witness will fall into this latter category. Finally, Judge Becker explained that a district court's discretion is no certain salve for the wounds of public broadcast, for they often arise unexpectedly. "Federal judges are not clairvoyants"; one never knows "what is going to happen in a trial." *Id.*

In this case, these concerns are not just hypothetical. *All* of Petitioners' witnesses have expressed concern over the potential public broadcast of trial proceedings, and some have stated that they will refuse to testify if the district court goes forward with its plan. Their distress is not unreasonable, as the record reflects repeated harassment of Prop 8 supporters. *See* Doc. Nos. 187-1; 187-2 at ¶¶ 10-12; 187-9 at ¶¶ 6-8; 187-9 at 12-15; 187-11; 187-12 at ¶¶ 5-6; 187-13 at ¶ 8; *see also* Thomas M. Messner, *The Price of Prop 8*, *available at* www.heritage.org/Research/Family/bg2328.cfm; www.youtube.com/watch?v=hcKJEHrvwDI (documenting instance of harassment). This campaign of harassment and reprisal has often been "targeted and coordinated," Messner, *supra*, and the retaliation has often been quite serious. *See, e.g.*, Doc No. 187-11 at 81 (Brad Stone, *Disclosure, Magnified on the Web*, N.Y. TIMES (Feb. 8, 2009) ("Some donors to groups supporting the measure have received death threats and envelopes containing a powdery white substance ...."). Broadcasting the trial would vastly increase the likelihood that trial participants would face similar experiences.

Broadcasting this trial would also impinge upon the privacy interests of witnesses, "some of whom are only tangentially related to the case, but about whom very personal and identifying information might be revealed." Duff Letter (CA App., Ex. 4) at 2. Already, one website "takes the names and ZIP codes of people who donated to the ballot measure ... and overlays the data on a Google map." Doc No. 187-11 at 81. Another website published the name, hometown,

home phone numbers, workplace, workplace contact information, and pictures of Prop 8 supporters so that "whenever someone Googles them this [website] will come up." *Id.* at 55, 62, 65-66, 73, 77.

(ii) *Effect on Attorneys.* The FJC study revealed that "twenty-seven percent of the attorneys reported that the cameras distracted them." Testimony of Judge Becker (CA App., Ex. 21) at 2. And "[f]ifty-six percent of the appellate judges found that, to some extent or greater, cameras cause attorneys to change the emphasis or content of their oral arguments." *Id.* Many judges also concluded that "cameras caused attorneys to be more theatrical in their presentations." *Id.* As Judge O'Scannlain explained to Congress, "[c]ameras provide a very strong temptation for ... attorneys ... to try their cases in the court of public opinion rather than in a court of law." CA App., Ex. 3 at 52; *see also* Duff Letter (CA App., Ex. 4) at 2.

(iii) *Effect on Judges.* The Judicial Conference has also cited "disturbing reports about the effect of ... cameras on judges," with "[n]ine percent of ... trial judges report[ing] that at least to some extent the cameras caused judges to avoid unpopular decisions or positions." Testimony of Judge Becker (CA App., Ex. 21) at 2. And "34 percent [of appellate judges] reported that at least to some extent cameras cause judges to change the emphasis or content of their questions at oral argument." *Id.* And these are judges who *self-reported* their views.

(iv) *Security Concerns.* The Judicial Conference has repeatedly stressed:

> [T]he presence of cameras in a trial courtroom ... increases security and safety issues. Broadcasting the images of judges and court employees, such as court reporters, courtroom deputies, and law clerks, makes them more easily identified as targets by those who would attempt to influence the outcome of the matter or exact retribution for an unpopular court ruling. Threats against judges, lawyers, and other participants could increase even beyond the current disturbing level. Cameras create similar security concerns for law enforcement personnel present in the courtroom, including U.S. marshals and U.S. attorneys and their staffs.

Duff Letter (CA App., Ex. 4) at 3; *see also* Testimony of Judge O'Scannlain (CA App., Ex. 3) at 52-53. Security is particularly important today, as annual "[t]hreats against federal judges, U.S. Attorneys, Assistant U.S. Attorneys ..., and other court officials ... have more than doubled during the past several years, increasing from 592 in fiscal year (FY) 2003 to 1,278 in FY 2008." U.S. Dep't of Justice, Office of the Inspector General, *Review of the Protection of the Judiciary and the United States Attorneys* (CA App., Ex. 23) at 1 (Dec. 2009).

* * *

Finally, as Judge Becker explained, all of these concerns arose just from a study of low-profile cases. He warned that in "truly high-profile cases" one can "[j]ust imagine what the findings would be." CA App., Ex. 21 at 2.

Plaintiffs discount all of the Judicial Conference's concerns, claiming that the First Amendment grants a right to public broadcast of this trial. *See* Doc Nos. 327, 334. This contention is without foundation. As Judge O'Scannlain explained, "increased public education cannot be allowed to interfere with the judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases." CA App., Ex. 3 at 48. And "today, as in the past, federal court proceedings *are* open to the public; however, nothing in the First Amendment *requires* televised trials." *Id.* at 57. Judge O'Scannlain noted that *Estes*, *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16 (2d Cir. 1984), and *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986), all "forcefully make the point that, while all trials are public, there is no constitutional right of media to broadcast federal district court or appellate court proceedings." *Id.* at 57-59. And just last year, the First Circuit rebuffed this very argument when made by broadcasters in another case that elicited significant public interest. *See In re Sony BMG Music Entertainment*, 564 F.3d 1, 8-9 (1st Cir. 2009) ("the venerable right of

members of the public to attend federal court proceedings is far removed from an imagined entitlement to view court proceedings remotely on a computer screen").

II. The Full Court Would Very Likely Grant a Writ of Certiorari or a Writ of Mandamus and Vacate the Order Designating This Case for Public Broadcast

Some Members of this Court have expressed strong skepticism about the wisdom of broadcasting judicial proceedings. But quite apart from the views of individual Justices on the merits of the issue, the courts below did not follow the statutorily mandated processes for effecting so fundamental a change in the policies and procedures governing federal court trials.

At the December 16, 2009, pretrial conference, the district court correctly acknowledged that it lacked authority to permit public broadcast of the trial in this case. *See* Tr. of Hr'g of Dec. 16, 2009 (CA App., Ex. 12) at 10. Local Rule 77-3 unambiguously prohibited it, as did the policy of the Ninth Circuit Judicial Council and the Judicial Conference of the United States. Local Rule 77-3 "has the force of law," *Weil v. Neary*, 278 U.S. 160, 169 (1929), and therefore bound the trial court. *See, e.g., United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 112 (2d Cir. 1984) (district judge bound by local rule prohibiting recording of proceedings); *United States v. Hastings*, 695 F.2d 1278, 1279 nn.4-5 (11th Cir. 1983) (same).

In similar circumstances, the First Circuit recently issued a writ of mandamus overturning an order permitting a webcast of a trial. *See Sony*, 564 F.3d 1. Although a local rule barred the broadcast, *see id.* at 10, the trial court had sought to read into the rule discretionary authority to allow it. Declaring that "the Judicial Conference's unequivocal stance against the broadcasting of civil proceedings ... is entitled to substantial weight," the First Circuit held the trial court lacked discretion to broadcast the trial. *Id.* at 7. The court of appeals emphasized " 'that the intimidating effect of cameras' in the courtroom presented 'cause for concern.' " *Id.*; *see also In re Complaint Against District Judge Billy Joe McDade*, No. 07-09-90083 (7th Cir. Sept. 28,

2009) (Easterbrook, C.J.) (district judge "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" by permitting broadcast of civil trial contrary to local rule and policies of Judicial Conference and Seventh Circuit Judicial Council).

The district court in this case thus rests its order permitting public broadcast of the upcoming trial entirely upon the revision to Local Rule 77-3 promulgated on January 4 and the Circuit Judicial Council's December 17 press release announcing the pilot program. But neither policy change was made with statutorily required public notice and opportunity for comment and thus neither authorized the district court's order. Moreover, the district court's order violates Petitioners' due process rights.

A. The Purported Revision of Local Rule 77-3

Federal district courts have the power to promulgate local rules and to amend those rules, but "[a]ny rule prescribed by a court, other than the Supreme Court, ... shall be prescribed only after giving appropriate public notice and an opportunity for comment." 28 U.S.C. § 2071(b); *see also* FED. R. CIV. P. 83(a)(1) (district court may amend rules only "[a]fter giving public notice and an opportunity for comment"); N.D. Cal L.R. 83-3(a) ("Before becoming effective, any proposed substantive modification of the local rules shall be subject to public comment ...."); *United States v. Hernandez*, 251 F.3d 1247, 1251 (9th Cir. 2001).[4]

On December 23, 2009, the Northern District announced on its website that it had revised Local Rule 77-3, effective December 22. *See* CA App., Ex. 14; Doc. No. 332 (order of Dec. 30, 2009) (recognizing the "recent ... amendment of Civil LR 77-3"). However, after Petitioners objected to the lack of prior public notice and opportunity for comment, *see* Doc. Nos. 324, 326,

[4] Before prescribing a local rule, a district court must also "appoint an advisory committee for the study of the rules of practice ... of such court." 28 U.S.C. § 2077(b); *see also* Local Rule 83-1 ("Any proposed substantive modification or amendment of these local rules must be submitted to a Local Rules Advisory Committee for its review ....").

the district court, late in the day on New Year's Eve, removed from its website the notice of the completed revision and substituted a notice of "proposed" revision. CA App., Exs. 15 & 16. The notice stated that a comment period would be open through Friday, January 8, 2010—a total of five business days following the New Year's holiday weekend for interested persons to submit comments on the proposed revision to Local Rule 77-3.

On January 4, 2010, the district court again revised its posting, this time removing the "proposed" revision to Local Rule 77-3 and substituting a notice stating that the revision had been "adopted" effective December 22, 2009. *See* CA App., Ex. 19. The notice stated that the "[t]he revised rule was adopted pursuant to the 'immediate need' provision of Title 28 Section 2071(e)." *Id.*

This haphazard process does not come close to satisfying the statutory requirement of appropriate advance public notice and an opportunity for comment. *Cf. Miner v. Atlass*, 363 U.S. 641, 650 (1960) (procedure for promulgating federal civil rules is "designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords"). Courts ordinarily allow at least 30 days for comment on a proposed local rule.[5] That conforms to the agency practice under the Administrative Procedure Act, which was intended to guide judicial rulemaking. *See* Notes of Advisory Committee on 1985 Amendments to FED. R. CIV. P. 83. Agencies "usually" provide a comment period of "thirty days or more." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992); *see also Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984)

[5] *See, e.g.*, United States Court of Appeals for the Ninth Circuit, *Opportunity for Comment – Rules Governing Judicial Misconduct Complaints* (Dec. 21, 2009) (30-day comment period) (CA App., Ex. 24).

(Administrative Conference suggests 60 days, and concludes that "the shortest period in which parties can meaningfully review a proposed rule and file informed responses is thirty days") (quotation marks omitted).

The five business days afforded by the Northern District for comment was therefore patently inadequate—especially for an issue that the Judiciary and Congress have spent years debating. It is doubtful that many interested persons became aware of the New Year's Eve notice before the comment period expired. And given the haste and determination with which the district court has sought to revise the local rule—an effort that, as discussed below, reached its zenith when the court implemented the revision even before the truncated comment period had ended—it appears no serious consideration would have been or will be given to the views of the commenters who managed to meet the deadline. Especially given the seismic shift in policy effected by the revision—contravening the long-established policy of the Judicial Conference of the United States based on the fear that broadcasting would deprive litigants of a fair trial (which policy is "at the very least entitled to respectful consideration," *Sony*, 564 F.3d at 6)—this process was woefully inadequate.

A local rule adopted without appropriate notice and a meaningful opportunity for comment is invalid and unenforceable. *United States v. Terry*, 11 F.3d at110, 113 (9th Cir. 1993); *see also United States v. Klubock*, 832 F.2d 664, 671-75 (1st Cir. 1987) (Breyer, J., dissenting) (local rule "is too important, its ramifications too complex, its contours too uncertain" to be adopted without " 'appropriate public notice and an opportunity to comment' ").

Finally, the district court's last-minute invocation of the "immediate need" exception to the notice and comment mandate, *see* 28 U.S.C. § 2071(e), does not save the revision. There is little case law applying the § 2071(e) "immediate need" exception, *cf. United States v. Carr*,

2006 U.S. Dist. LEXIS 74757, at *3-7 (E.D. Cal. 2006) (invoking § 2071(e) "immediate need" exception to promulgate rule requiring criminal defendants to be fully shackled at initial appearances in light of recent history of threats against judges and other court personnel and participants), but the APA again provides useful guidance. An agency may dispense with the comment period "when [it] for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). Courts "construe" the APA's exception "narrowly"; "notice and comment procedures should be waived only when delay would do real harm." *NRDC v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003) (quotation marks omitted).

The district court failed to provide any statement of its reasons for invoking the immediate-need exception here. The Circuit Judicial Council took two years to act on its 2007 resolution in favor of allowing cameras in district courtrooms, and none of the other fourteen district courts in the Ninth Circuit has yet taken any public action to implement the pilot program. As the timeline of events detailed above suggests, the only conceivable "immediate need" was to amend the local rule in time to publicly broadcast this case. In reality, this is not an instance in which a particular case has been selected for televising under a pilot program; it is an instance of a pilot program being created for televising a particular case. No harm could result from delaying the amendment in order to receive and consider comments. The court has an unending stream of cases from which to find a suitable guinea pig. Certainly, such delay would not preclude the court from "execut[ing] its ... duties." *NRDC*, 316 F.3d at 911. On the contrary, as explained above, the district court's precipitate amendment of Local Rule 77-3 so that it could broadcast this controversial case threatens to harm Petitioners by interfering with

"the judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases." Testimony of Judge O'Scannlain, CA App., Ex. 3 at 48.

B. Ninth Circuit Judicial Council Policy

Even if the revision to Local Rule 77-3 were otherwise valid, it could not authorize the public broadcast of district court proceedings because the Ninth Circuit Judicial Council has not validly authorized such broadcasts as yet. The court below clearly erred by concluding that the December 17 press release constituted a valid revision of Judicial Council policy.

Congress has authorized the Council to "make all necessary and appropriate orders for the effective and expeditious administration of justice within" the Ninth Circuit. 28 U.S.C. § 332(d)(1). But "[a]ny general order relating to practice and procedure shall be made or amended *only after* giving appropriate public notice and an opportunity for comment." *Id.* (emphasis added). This notice and comment procedure is a "check" placed by Congress on "the delegation of power to [the Council] under § 332(d)(1)." *Russell v. Hug*, 275 F.3d 812, 818 (9th Cir. 2002).

Other than the December 17 press release announcing the Council's vote in favor of a pilot program permitting public broadcast, the Council has not issued anything formally revising its 1996 policy prohibiting the public broadcast of civil trials—no general order, rule, or other official statement of policy. Standing alone, the Circuit Council's vote and subsequent press release do not represent a valid amendment of the 1996 policy and that policy remains in effect.

The invalidity of the Council's action renders the district court's order invalid, for it means that the 1996 Judicial Council policy remains in place and is binding on the trial court. If the Council has not validly launched a pilot or other program, then the new exception in revised Local Rule 77-3 does not apply.

C. The Lack of Guidelines Governing the Pilot Program

In light of the significant concerns raised by the Judicial Conference regarding public broadcast of district court proceedings and the lengthy guidelines that govern broadcast of Ninth Circuit proceedings, it is highly problematic that neither the Northern District nor the Circuit Judicial Council has promulgated or even noticed any rules or guidelines to govern the pilot program. *See Estes*, 381 U.S. at 537, 551 (holding that public broadcast of a trial violated due process where "the rules governing live telecasting ... were changed as the exigencies of the situation seemed to require" and the "day-to-day orders made the trial more confusing to ... the participants"). Even if the *per se* objections to public broadcast are to be ignored, such guidelines are needed to regulate the trial court's discretion in selecting cases for broadcast and placing restrictions on broadcasts. At a minimum, such regulations should provide that public broadcast should be permitted only if all parties and all witnesses consent.

D. Public Broadcast of the Trial in This Case Would Violate Petitioners' Due Process Right to a Fair Trial.

Public broadcast of this trial would violate Petitioners' due process right to a fair trial. In *Estes*, this Court held that "the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." 381 U.S. at 540.[6] There, the Court found public broadcast of a trial violated "the basic requirement of due process"—a "fair trial"—because, *inter alia*, public broadcast might have (i) "impaired" the "quality of the testimony," (ii) affected the responsibilities and demeanor of the judge, and (iii) created "mental—if not physical—harassment" of the defendant. *Id.* at 543, 547, 549 (quotation marks omitted). In this high-profile, highly contentious case, the potential for all these harms and many

---

[6] *Estes* involved a criminal trial, but civil litigants have no less of a Fifth Amendment due process right to a fair trial. *See, e.g., Jinro Am., Inc. v. Secure Inv., Inc.*, 266 F.3d 993, 1007 (9th Cir. 2001).

more is great. Thus, Petitioners respectfully submit that in the specific circumstances presented here, public broadcast would violate their due process rights to a fair and impartial trial.[7]

CONCLUSION

For the foregoing reasons, the Court should stay the district court's order permitting the proceedings in this case to be publicly broadcast on YouTube pending the timely filing and disposition of a petition for certiorari or mandamus.

January 9, 2010

Respectfully Submitted,

s/ Charles J. Cooper

Charles J. Cooper
Michael W. Kirk
Jesse Panuccio
COOPER & KIRK PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020

Counsel for Petitioners

Andrew P. Pugno
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Dr., Ste. 100
Folsom, CA 95630
(916) 608-3065

[7] In *Chandler v. Florida*, the Court held that *Estes* did not announce a *per se* due process ban on public broadcast, but left open an as-applied due process challenge in an appropriate case. 449 U.S. 560, 573, 582 (1981).

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January 2010, I caused to be served on the following counsel a true and correct copy of the foregoing via electronic mail:

Kenneth C. Mennemeier
Andrew W. Stroud
MENNEMEIER, GLASSMAN & STROUD LLP
980 9th Street, Suite 1700
Sacramento, CA 95814-2736
kcm@mgslaw.com
gosling@mgslaw.com
aknight@mgslaw.com
stroud@mgslaw.com
lbailey@mgslaw.com

Attorneys for the Administration Defendants

Gordon Burns
Tamar Pachter
OFFICE OF THE ATTORNEY GENERAL
1300 I Street, Suite 125
P.O Box. 944255
Sacramento, CA 94244-2550
Gordon.Burns@doj.ca.gov
Tamar.Pachter@doj.ca.gov

Attorneys for Defendant Attorney General Edmund G. Brown, Jr.

Dennis J. Herrera
Therese M. Stewart
OFFICE OF THE CITY ATTORNEY
City Hall, Room 234
One Dr. Carlon B. Goodlett Place
San Francisco, California 94102-4682
therese.stewart@sfgov.org
erin.bernstein@sfgov.org
vince.chhabria@sfgov.org
danny.chou@sfgov.org
ronald.flynn@sfgov.org
mollie.lee@sfgov.org
Christine.van.aken@sfgov.org
catheryn.daly@sfgov.org

Attorneys for Plaintiff-Intervenor City and County of San Francisco

Elizabeth M. Cortez
Judy W. Whitehurts
THE OFFICE OF CITY COUNSEL
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012-2713
jwhitehurst@counsel.lacounty.gov

Attorneys for Defendant Dean C. Logan Registrar-Recorder/County Clerk, County of Los Angeles

Richard E Winnie
Brian E. Washington
Claude F. Kolm
Manuel F. Martinez
THE OFFICE OF CITY COUNSEL
1221 Oak Street, Suite 450
Oakland, California 94612
Brian.washington@acgov.org
Claude.kolm@acgov.org

Ted Olson
Matthew McGill
Amir Tayrani
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
T: (202) 955-8500
F: (202) 467-0539
TOlson@gibsondunn.com

Lindsey.stern@acgov.org
Judith.martinez@acgov.org

Attorneys for Defendant Patrick O'Connell Clerk Recorder of the County of Alemeda

Terry L. Thompson
LAW OFFICE OF TERRY L. THOMPSON
P.O. Box 1346
Alamo, CA 94507
T: (925) 855-1507
F: (925) 820-6035
tl_thompson@earthlink.net

Attorney for Defendant-Intervenor Hak-ShingWilliam Tam

MMcGill@gibsondunn.com
ATayrani@gibsondunn.com

Theodore Boustrous, Jr.
Christopher Dusseault
Theane Kapur
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90072-1512
T: (213) 229-7000
F: (213) 229-7520
TBoutrous@gibsondunn.com
CDusseault@gibsondunn.com
TKapur@gibsondunn.com
SMalzahn@gibsondunn.com

Ethan Dettmer
Enrique Monagas
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105
T: (415) 393-8200
F: (415) 393-8306
EDettmer@gibsondunn.com
SPiepmeier@gibsondunn.com
EMonagas@gibsondunn.com
RJustice@gibsondunn.com
MJanky@gibsondunn.com

Theodore Uno
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612
T: (510) 874-1000
F: (510) 874-1460
jgoldman@bsfllp.com
tuno@bsfllp.com
brichardson@bsfllp.com
rbettan@bsfllp.com
jischiller@bsfllp.com

Attorneys for Plaintiff Kristin M. Perry

s/Charles J. Cooper
Charles J. Cooper

No. 09A648

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,

Applicants,

v.

KRISTIN M. PERRY, ET AL.,

Respondents.

SUPPLEMENTAL APPENDIX OF KRISTIN M. PERRY ET AL.

THEODORE J. BOUTROUS, JR.
THEANE EVANGELIS KAPUR
ENRIQUE A. MONAGAS
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7804

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondents

Index of Documents

Description	Exhibit
United States Court of Appeal for the Ninth Circuit, "Guidelines for Photographing, Recording, and Broadcasting in the Courtroom," *at* http://www.ca9.uscourts.gov/ content/view.php?pk_id=0000000110	1
Letter from Plaintiffs to the Honorable Vaughn R. Walker (Dec. 29, 2009)	2
In re Pilot District Court Public Access Program Approved December 16, 2009, No. 2010-2 (9th Cir. Jan. 8, 2010) (Kozinski, C.J.)	3
News Release, Federal Courthouses to Offer Remote Viewing of Proposition 8 Trial (Jan. 8, 2010), *at* http://www.ce9.uscourts.gov/index.html	4
Frank Schubert & Jeff Flint, "Passing Prop 8: smart timing and messaging convinced California voters to support traditional marriage," *Politics Magazine* (Feb. 1, 2009)	5
Civil Minute Order in *Perry v. Schwarzenegger*, No. 3:09-cv-02292-VRW (Aug. 19, 2009)	6

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GUIDELINES FOR PHOTOGRAPHING, RECORDING, AND BROADCASTING IN THE COURTROOM

1. General Provisions

(a) Coverage of proceedings in open Court is permissible only in accordance with these guidelines.

(b) A three business day advance notice is required from the media of a request to be present to broadcast, televise, record electronically, or take photographs at a particular session. Such requests must be submitted to the Clerk of Court using the form attached to these guidelines. The panel may waive the three business day requirement under appropriate circumstances.

(c) Upon receipt of a media request, the Clerk of Court will notify the panel and counsel of record of such request. The panel will retain the authority, in its sole discretion, to prohibit camera coverage of any proceeding.

(d) The presiding judge of the panel may limit or terminate media coverage, or direct the removal of camera coverage personnel when necessary to protect the rights of the parties or to assure the orderly conduct of the proceedings.

(e) No direct public expense is to be incurred for equipment, wiring, or personnel needed to provide media coverage.

(f) These guidelines take effect June 21, 1996.

2. Limitations

(a) Coverage of all proceedings in open court is permitted unless prohibited by rule or statute. Camera coverage must be conducted in conformity with applicable statutes and rules.

(b) There shall be no audio pickup or broadcast of conferences between attorneys and their clients, between co-counsel, or among members of the panel.

3. Equipment and Personnel

(a) Only two television cameras, with one operator per camera, and one still photographer will be permitted in the courtroom. The Clerk of Court, or designee, shall identify the location in the courtroom for the camera equipment and operators.

(b) Equipment shall not produce distracting sound or light. Signal lights or devices to show when equipment is operating shall not be visible. Motorized drives, moving lights, flash attachments, or sudden light changes shall not be used. Still cameras that do not operate quietly will not be used at any time when court is in session.

(c) Except as otherwise approved by the Clerk of Court or designee, existing courtroom sound and light systems shall be used without modification. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility, or from a television camera's built-in microphone. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance by the Clerk or designee.

(d) All equipment must be set up prior to the opening of the court session and may not be removed until after the conclusion of the court sessions, or during a court recess. Camera operators shall wear suitable attire in the courtroom.

(e) Media personnel shall also adhere to the direction of the Clerk of Court or designee in such matters as security, parking, noise avoidance, and other related issues.

(f) Media personnel may not interview participants in the courtroom until the conclusion of the court session, and the judges have left the bench. The court may, where space is available, make available a separate room where news reporters and photographers may conduct their business with the consent of persons willing to participate in such interviews.

4. News Media Pooling

(a) Camera coverage will be permitted by any person or entity regularly engaged in the gathering and dissemination of news. If coverage is sought by more than one person or entity, a pool system must be used. Each media representative must submit an application on behalf of its organization.

(b) It will be the responsibility of the news media to agree upon a pooling arrangement for their respective news medium. Such pooling arrangements shall include the designation of pool operators, procedures for pool sharing, access to and dissemination of material, and selection of a pool representative if appropriate.

(c) The court may not be called upon to mediate or resolve any dispute as to such arrangements. The Clerk of Court shall be notified of any pooling arrangements at least 24 hours prior to the court proceeding.

5. Educational Institutions

The Court may also authorize the coverage of court proceedings and access to pooled coverage by educational institutions.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

_____)

Appellant,) APPLICATION FOR PERMISSION
) TO PHOTOGRAPH, RECORD, OR
) BROADCAST FROM THE COURTROOM

v.)

) Court of Appeals Docket No.

_____)
)

Appellee.)

_____)

TO THE COURT:

The undersigned hereby applies for permission to photograph, record or broadcast the above judicial proceeding.

1. Permission is requested to cover the following (check all that apply):

_____oral argument _____other (specify)

2. The proceedings are expected to be (check all that apply):

___ televised live ___ radio (broadcast live)

___ videotaped for later broadcast ___ audio-recorded for later broadcast

___ photographed with still camera ___ other (specify)

3. The scope of coverage requested is (check as appropriate):

___ throughout entire proceeding
___ during the following portion(s) of proceeding (specify):

4. Date of coverage: _____

APPLICANT INFORMATION

Name: (Print) _____ Phone: _____

Media Organization: _____

Business Address: _____

Signature: _____ Date: _____

[This form must be submitted to Clerk of Court, at least three (3) business days before the date of requested coverage. Please fax to (415) 355-8551. Thank you.]

GIBSON, DUNN & CRUTCHER LLP
LAWYERS
A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

333 South Grand Avenue, Los Angeles, California 90071-3197
(213) 229-7000
www.gibsondunn.com
TBouvet@gibsondunn.com

December 29, 2009

Direct Dial
(213) 229-7804
Fax No.
(213) 229-6804

Client Matter No.
36330-00001

The Honorable Vaughn R. Walker
Chief Judge of the United States District Court
for the Northern District of California
450 Golden Gate Ave.
San Francisco, California 94102

Re: *Perry v. Schwarzenegger*, No. C-09-2292 VRW

Dear Chief Judge Walker:

I write in response to Proponents' letter of December 28, 2009, opposing the public broadcast of the upcoming trial in this case. Plaintiffs strongly support televising the trial in order to afford the public meaningful access to the proceedings in this exceptionally important case.

It is well within this Court's authority to televise the trial proceedings. The Judicial Council of the Ninth Circuit has expressly authorized district courts to televise civil non-jury matters. *See* News Release, Ninth Circuit Judicial Council Approves Experimental Use of Cameras in District Courts (Dec. 17, 2009), *at* http://www.ce9.uscourts.gov/cm/articlefiles/137-Dec17_Cameras_Press%20Relase.pdf. In accordance with that authorization, this Court revised its Local Rule 77-3 on December 22, 2009, to provide that, "[u]nless allowed by a Judge or a Magistrate Judge . . . *for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit*, the taking of photographs, public broadcasting or televising . . . in connection with any judicial proceeding[ ] is prohibited." (Revisions italicized).

Proponents are therefore simply wrong when they assert that "Rule 77-3 flatly prohibits the broadcast or webcast of trial proceedings beyond the courthouse." Doc # 324 at 2. As amended, Rule 77-3 expressly affords district courts the discretion to televise proceedings when authorized to do so by the Judicial Council of the Ninth Circuit. Proponents are equally wrong when they contend that "video depiction of the trial proceedings in this case . . . would violate . . . this Court's General Order No. 58." *Id.* at 1. Although Proponents neglect to quote the

relevant language, General Order No. 58 explicitly authorizes this Court to deviate from the general prohibition on courtroom broadcasts imposed by that Order, which provides that, "*[e]xcept as may be otherwise ordered by a judge of this court*, . . . [p]hotographs may not be taken and images may not be captured by any means in the courthouse."

Moreover, while it is the position of the Judicial Conference of the United States that cameras should not be permitted in federal district courts, that policy is not binding on this Circuit or this Court. *See Armster v. United States Dist. Court*, 806 F.2d 1347, 1349 n.1 (9th Cir. 1986) ("Except for judicial disciplinary proceedings, the Judicial Conference does not have binding or adjudicatory authority over the courts."). The nonbinding nature of the Judicial Conference's camera policy is confirmed by the fact that both the Southern District of New York and the Eastern District of New York have policies expressly authorizing judges to broadcast civil proceedings. *See* S.D.N.Y. Local Civ. R. 1.8; E.D.N.Y. Local Civ. R. 1.8.

Televising the bench trial proceedings in this case would also promote deeply rooted First Amendment principles that favor broad public access to judicial proceedings. *See Phoenix Newspapers v. United States Dist. Ct.*, 156 F.3d 940, 946 (9th Cir. 1998) ("One of the most enduring and exceptional aspects of the Anglo-American justice system is an open public trial."). Indeed, the Supreme Court has recognized that a "trial is a public event" and that "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Because "it is difficult for [people] to accept what they are prohibited from observing," (*Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980) (op. of Burger, C.J.)), the First Amendment guarantees free and open access to judicial proceedings in order to foster public confidence in the judicial system. Broad public access to judicial proceedings also "protect[s] the free discussion of governmental affairs" that is essential to the ability of "the individual citizen . . . [to] effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

In light of the overwhelming national public interest in the issues to be decided in this case, providing a broadcast of the proceedings is the most effective means of affording the public its constitutionally guaranteed right of access. More than 13 million Californians cast a vote for or against Prop. 8. And there are hundreds of thousands of gay and lesbian Californians who have a direct stake in the outcome of this case. Ultimately, however, the issues in this case are of such transcendent importance that *every* Californian should be afforded an opportunity to view the proceedings to the greatest extent practicable. Indeed, far from detracting from the right of public access (Doc # 324 at 6), the "highly contentious and politicized" character of the issues to be resolved in this case underscores the importance of providing the public with a meaningful window into the trial proceedings so it can see and hear what is happening in the courtroom. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed."). The "ability to see and to hear a proceeding as i[t] unfolds is a vital

component of the First Amendment right of access." *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004).

Proponents' concerns about "the possibility of compromised safety, witness intimidation, and/or harassment of trial participants" (Doc # 324 at 6) are utterly unsubstantiated and groundless speculation. Indeed, Proponents willingly thrust themselves into the public eye by sponsoring Prop. 8 and orchestrating an expensive, sophisticated, and highly public multimedia campaign to amend the California Constitution. They certainly did not exhibit a similar fear of public attention when attempting to garner votes for Prop. 8 from millions of California voters, when touting their successful campaign strategy in post-election magazine articles and public appearances (*see* Doc # 191-2; http://www.youtube.com/watch?v=ngbAPVVPD5k), or when voluntarily intervening in this case. In any event, many aspects of the trial—including opening and closing arguments and testimony by the parties' experts (who were designated *after* the Court first raised the possibility of televising the proceedings)—will not even remotely implicate Proponents' purported witness-related concerns. To the extent that this Court determines that witness issues or other factors militate against permitting camera coverage of particular portions of the trial, the Court possesses broad discretion to decide, on a case-by-case basis, whether certain portions of the proceedings should not be televised and can control the format and timing of all broadcast transmissions.

This case is an ideal candidate for the pilot camera project authorized by the Judicial Council of the Ninth Circuit. Plaintiffs stand ready to assist the Court in developing and implementing broadcast procedures, and the Media Coalition has indicated that it is willing to do the same. If this case—which raises constitutional issues of vital importance and overriding interest to millions of Californians and citizens across the Nation—is not appropriate for broadcast under the pilot project, it is difficult to conceive of any case that would be.

Thank you for considering our views on this important issue.

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
Counsel for Plaintiffs

cc: Counsel of Record

FILED

JAN 08 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JUDICIAL COUNCIL

OF THE NINTH CIRCUIT

IN THE MATTER OF PILOT DISTRICT COURT PUBLIC ACCESS PROGRAM APPROVED DECEMBER 16, 2009	No. 2010–2 **ORDER**

KOZINSKI, Chief Judge:

I have received a request from the Chief Judge of the Northern District of California to permit audio-video recording and transmission of pre-trial proceedings and trial in Perry v. Schwarzenegger, No. 3:09-cv-02292-VRW. The request is granted, limited to real-time live streaming to federal courthouses to be designated by the Circuit and Court of Appeals Executive, and subject to such procedures and limitations as the district judge presiding over the case may deem appropriate. The request for posting the files of the videos on the district court's website is still pending.

Public Information Office
United States Courts for the Ninth Circuit
Office of the Circuit Executive · 95 7th Street, San Francisco, CA 94103 · (415) 355-8800 · (415) 355-8901 Fax

NEWS RELEASE

January 8, 2010

Contact: David J. Madden (415) 355-8930
dmadden@ce9.uscourts.gov

Federal Courthouses to Offer Remote Viewing of Proposition 8 Trial

SAN FRANCISCO – A live video and audio feed from the upcoming Proposition 8 trial in San Francisco will be available for public viewing in federal courthouses elsewhere in California, and in Oregon, Washington and New York, it was announced today. Video and audio of the trial, which is scheduled to begin Monday, January 11, 2010, at 8:30 a.m. (PDT), will be distributed via electronically secure means to the federal courthouses listed below.

The Proposition 8 case, officially known as *Perry v. Schwarzenegger*, is the first in which video will be recorded and disseminated by the court under a pilot program approved by the Judicial Council of the Ninth Circuit, governing body for federal courts in the western states. The civil, non-jury trial of a constitutional challenge to California's gay marriage ban will be presided over by Chief District Judge Vaughn R. Walker of the U.S. District Court for the Northern District of California.

The U.S. District Court in San Francisco, which has installed cameras and obtained other equipment for video recording, will fully control the process. Because this is an experimental effort, the court cannot guarantee the reliability, accuracy or availability of the audio/video presentation. Further, Judge Walker has reserved the right to terminate any part of the audio, or video, or both, for any duration, or to terminate the complete experiment at any time.

The trial is expected to last about two weeks. While it is intended that the remote viewing locations would be available for the entire trial, adjustments may be made. Due to time zone differences, starting and ending times will differ and viewing hours may be limited at some remote viewing locations. Public access to the remote viewing locations will be on a first-come-first-served basis. No photographs or recording of the audio and video displayed at the remote viewing locations will be allowed.

Information about *Perry v. Schwarzenegger* is available online at the U.S. District Court for the Northern District of California: www.cand.uscourts.gov.

– *more* –

REMOTE VIEWING LOCATIONS

(Additional sites may be announced)

Perry v. Schwarzenneger
Case No. 3:09-cv-02292
U.S. District Court for the Northern District of California

James R. Browning United States Courthouse
95 7th St.
San Francisco, California
Library Conference Room, First Floor

United States Court of Appeals
Pioneer Courthouse
700 S.W. Sixth Avenue
Portland, Oregon
Courtroom, Second Floor

William K. Nakamura United States Courthouse
1010 Fifth Avenue
Seattle, Washington.
Courtroom One, Eighth Floor

Theodore Roosevelt United States Courthouse
225 Cadman Plaza East
Brooklyn, New York
Courtroom 8A South, Eighth Floor

Richard H. Chambers United States Courthouse
125 South Grand Avenue
Pasadena, California
Courtroom Three, First Floor

Contact: David J. Madden
(415) 355-8930
dmadden@ce9.uscourts.gov

###

ACCESS | my | LIBRARY

Magazine

Passing Prop 8: smart timing and messaging convin ced California voters to support traditional marriage.(CASE STUDY)(California Prop osition 8)

Politics Magazine | February 1, 2009 | Schubert, Frank; Flint, Jeff

When we signed our firm up to manage the Yes on Proposition 8 campaign to put the traditional definition of marriage--one man, one woman--into California's constitution, Frank Schubert's brother told him we had "no chance" to win the campaign. That view reflected conventional wisdom. After all, California is one of the most liberal states in the nation. It's a state whose Supreme Court had just legalized same-sex marriage. A state where the Democratic nominee for president hasn't had to aggressively campaign in nearly two decades. A state where millions of young, first-time voters were poised to go to the polls to send a message to George Bush and elect Barack Obama. And a state where for the first time in history, according to a major polling outfit, a majority of voters supported gay marriage.

[ILLUSTRATION OMITTED]

This is the story of how conventional wisdom was stood on its head and how Proposition 8 was enacted by a 700,000-vote margin.

The Early Campaign Period

Schubert Flint Public Affairs signed onto the Yes on Prop 8 campaign right before the first of what would eventually total 18,000 gay weddings took place after the California Supreme Court legalized gay marriage. We immediately faced our first important strategic challenge: How to respond to the marriages? We decided to withhold criticism of the same-sex couples who were getting married (after all, they were simply taking advantage of the rights the Court had granted them), and urged all our supporters to refrain from demonstrations, protests or rallies opposing the marriages. This initial strategic positioning, later validated in qualitative and quantitative research, recognized that passing Proposition 8 would depend on our ability to convince voters that same-sex marriage had broader implications for Californians and was not only about the two individuals involved in a committed gay relationship.

On the first day that same-sex marriages took place, June 16, we fielded nearly 300 media calls from reporters around the globe. Our message was calm and low-key: Our fight was not with the gay couples getting married, our fight was with the flawed reasoning of a narrow majority of the California Supreme Court.

Over the next three months, sympathetic news articles and television reports appeared daily across the state. Traditional marriage supporters were routinely portrayed as right-wingers holding onto outdated, bigoted ideas. Gay marriage backers spent $6 million airing a sympathetic 60-second issue advocacy ad. And state Attorney General Jerry Brown shamelessly rewrote the official summary of the measure in a way clearly designed to bias voters against the initiative.

A survey released by the Field Institute in mid-September showed that fully 55 percent of likely voters were opposed to Prop 8, with just 38 percent in favor. The political elite all but wrote off Proposition 8 as being dead once the Field Poll was published. To make matters worse for us, less than a week after the Field Poll came out, the No on 8 campaign began its television advertising in the state's major media markets.

We worked hard during this period to urge our supporters to have faith that Prop 8 could still be enacted despite what they saw on the news. We organized countless meetings and conference calls of pastors and other campaign leaders. And we restructured our online presence and delivered a stream of messages to supporters designed to keep them informed and engaged.

Define the Terms; Win the Debate

One of the most important aspects of our behind-the-scenes work during this critical early period was to develop messages that would result in voters casting a Yes vote for traditional marriage. To do so, we had to have messages that appealed to a much broader audience than the 40 percent or so of voters who made up our base.

The dynamics of the Proposition 8 campaign were unique. We were asking voters for a Yes vote to ban same-sex

marriage and restore traditional marriage. We strongly believed that a campaign in favor of traditional marriage would not be enough to prevail. We needed to convince voters that gay marriage was not simply "live and let live"--that there would be consequences if gay marriage were to be permanently legalized. But how to raise consequences when gay marriage was so recently legalized and not yet taken hold? We made one of the key strategic decisions in the campaign, to apply the principles of running a "No" campaign--raising doubts and pointing to potential problems--in seeking a "Yes" vote. As far as we know, this strategic approach has never before been used by a Yes campaign.

We reconfirmed in our early focus groups our own views that Californians had a tolerant opinion of gays. But there were limits to the degree of tolerance that Californians would afford the gay community. They would entertain allowing gay marriage, but not if doing so had significant implications for the rest of society.

We probed long and hard in countless focus groups and surveys to explore reactions to a variety of consequences our issue experts identified. The California Supreme Court ruling put gay couples in a protected legal class on the basis of sexual orientation, and then found that gay couples had a fundamental constitutional right to marriage. This decision significantly changed the legal landscape. No longer would it be enough for Californians to tolerate gay relationships, they would have to accept gay marriage as being equivalent to traditional marriage. Tolerance is one thing; forced acceptance of something you personally oppose is a very different matter.

Whenever a conflict occurred between the rights of a gay couple and other rights, the rights of the gay couple would prevail because of their "protected class" legal status. We settled on three broad areas where this conflict of rights was most likely to occur: in the area of religious freedom, in the area of individual freedom of expression, and in how this new "fundamental right" would be inculcated in young children through the public schools. And we made sure that we had very concrete examples we could share with voters of things that had actually occurred.

Of equal importance to developing "consequence" messages was assembling a massive grassroots campaign. In most ballot measure campaigns, volunteers and activists are generally not as inspired as they are in candidate campaigns, where they feel a personal connection to the cause. This is particularly true in California, a state with 40 million residents, 17 million registered voters and well over 20,000 voting precincts. But we knew from the petition phase, where we gathered more than 500,000 signatures, that this campaign could very well prove to be the exception.

Our ability to organize a massive volunteer effort through religious denominations gave us a huge advantage, and we set ambitious goals: to conduct a statewide Voter ID canvass of every voter; to distribute 1.25 million yard signs and an equal number of bumper strips; to have our volunteers re-contact every undecided, soft yes and soft no voter; and to have 100,000 volunteers, five per voting precinct, working on Election Day to make sure every identified Yes on 8 voter would vote. All of these goals, and more, were achieved.

We built a campaign volunteer structure around both time-honored campaign grassroots tactics of organizing in churches, with a ground-up structure of church captains, precinct captains, zip code supervisors and area directors; and the latest Internet and web-based grassroots tools. Our campaign website was rebuilt to serve as an incredibly effective organizing tool. Online volunteer sign-ups were immediately sent electronically to the appropriate ZIP code supervisor for follow up. We set up a statewide voter file with remote access for regional volunteer leaders, which allowed them to input results for canvassing efforts remotely, and then download and print updated voter lists.

We held the campaign's first statewide precinct walk the weekend of Aug. 16. We had hoped for 20,000 volunteers, which would have been unprecedented in California ballot initiative politics, but were stunned when almost 30,000 people walked their neighborhoods that first weekend.

We produced campaign materials in more than 40 languages, and worked with church and community leaders to distribute these through the many ethnic networks that make up the fabric of California.

[ILLUSTRATION OMITTED]

This intense commitment to distributing materials throughout the state was the result of another key strategic decision. Supporting traditional marriage is not considered to be "politically correct. "We wanted voters who supported our position to know that they were not alone and so we made sure they saw our signs in their neighborhoods and our campaign materials at their church. And if they were part of an ethnic minority, all these were in their native language.

The final phase of the volunteer campaign, GOTV, was really a month-long operation. California allows early voting.

starting 29 days ahead of Election Day. From Day 1 of this period, we tracked voters who either appeared on the permanent absentee voter list, or had applied for a vote-by-mail ballot. Those who were identified as persuadable received additional volunteer and direct mail contacts. Definite Yes on 8 voters were reminded to return their ballots as early as possible. The effort paid off, as the early returns reported on Election Night--which consisted of votes cast before Election Day--showed us with a commanding 57 percent to 43 percent lead.

Fundraising was also a critical activity of this early period, the success of which enabled us to ultimately exceed our initial voter contact objectives. By this time, leaders of the Church of Jesus Christ of Latter Day Saints had endorsed Prop 8 and joined the campaign executive committee. Even though the LDS were the last major denomination to join the campaign, their members were immensely helpful in early fundraising, providing much-needed contributions while we were busy organizing Catholic and Evangelical fundraising efforts. Ultimately, we raised $22 million from July through September with upwards of 40 percent coming from members of the LDS Church. Our fundraising operation also relied heavily on small contributions from some 60,000 individual donors via an extensive direct mail operation, and an extraordinarily effective online fundraising campaign. When we filed our finance report electronically with the secretary of state, it was more than 5,000 pages thick and crashed the fishing system. We ultimately raised more than $5 million online, and $3 million from direct mail.

Our initial television ad began airing on Sept. 29, a week after the other side began its campaign ads, and six weeks after its issue advocacy spot began airing. We knew that this initial ad needed to be a home run--and boy was it! Our campaign's general counsel had alerted us to a press conference San Francisco Mayor Gavin Newsom held following the Supreme Court's marriage decision in May. Like Howard Dean once did, Newsom got increasingly excited the longer he addressed the crowd until, with a smirk on his face and his arms fully extended, he exclaimed, "This door's wide open now. It's gonna happen--whether you like it or not." That 7-second sound bite perfectly summarized for California voters why this issue was before them, reminding voters that four judges had overruled four million voters by imposing same-sex marriage on California. We then segued into potential consequences by featuring a prominent law school professor warning about implications for religious freedom and freedom of expression, and letting voters know that as a result of the court's decision, gay marriage would be taught in the public schools.

The "Whether You Like It or Not" television ad immediately solidified (and excited) our base and captured the attention of voters across the state. We invested heavily in airing this television ad and a companion radio spot. We had a lot of ground to make up (our internal polls had us behind by 6 points), but more importantly, it was critical for us to define Prop 8 on our terms. In a little over a week of advertising, we went from being significantly behind, to taking the lead in two published polls.

The Response Period

The gay community sounded the alarm by releasing to the gay media an internal poll showing them behind and telling their supporters they would lose unless more money was raised. This emergency cry for contributions was incredibly effective. Whereas they had raised $15 million in the previous nine months, they raised another $25 million in the ensuing seven weeks of the campaign.

But their failure to respond to the "consequences" messages (especially the education message) in a timely fashion ultimately led to their downfall. After blanketing the state with "Whether You Like It or Not," we focused our message on education. We ran an ad featuring a young Hispanic girl coming home from school, explaining how she had learned in class that a prince could marry another prince, and she could marry a princess! This ad was based on the actual experience in Massachusetts, the only state in the nation where gay marriage had been legalized long enough to see how it would be handled by the public school system. This was followed by another education ad, this one featuring a Massachusetts couple whose son had been introduced to gay marriage in second grade. The launch of that ad included a press conference with the Massachusetts couple and corresponded with the kick-off of a statewide bus tour designed to rally our supporters before the final push on Election Day.

The response to our ads from the No on 8 campaign was slow and ineffectual. They enlisted their allies in the education system to claim that we were lying. They held press conferences with education leaders to dismiss our claims. They got newspaper editorial boards to condemn the ads as false. What they never did do, because they couldn't do, was contest the accuracy of what had happened in Massachusetts.

Finally, three weeks after the Yes on 8 campaign had introduced education as a message, the No on 8 campaign

responded with what would be their best ad of the campaign. It featured State Superintendent of Public Instruction Jack O'Connell claiming that Prop 8 had nothing to do with education and that our use of children in our ads was "shameful." This in-your-face response, much delayed but very effective, foretold the final period of the campaign--it would be largely about education.

Even though our campaign clearly had the better ads and grassroots operation, the success of the No side's fundraising effort threatened to undo all our work. Voters were seeing their commercials at least twice as often as ours as the campaign headed into its final 12 days. Our lead evaporated. Frank Schubert wrote an e-mail to our 90,000 online supporters called "Code Blue for Marriage," letting them know we needed more money to be victorious. This e-mail, along with other emergency fundraising activities, helped produce $7.5 million in contributions from people of faith in the next 72 hours.

The Final Push

Our strategy had anticipated that the No on 8 campaign would label as "shameful lies" any claim that gay marriage had anything to do with schools, so we went to great lengths to document our ads. We were prepared to play this scenario out to the finish, trading our ads of what happened in Massachusetts, with the No side's ads saying it wouldn't happen in California. But then we got the break of the election. In what may prove to be the most ill-considered publicity stunt ever mounted in an initiative campaign, a public school in San Francisco took a class of first graders to City Hall to witness the wedding of their lesbian teacher. And they brought along the media.

Now we not only had an example of something that had happened in California (as opposed to might happen), we had video footage to prove it. Within 24 hours of the No side airing their best ad, the one featuring O'Connell claiming that Prop 8 had nothing to do with schools, we were on statewide TV showing bewildered six-year-olds at a lesbian wedding courtesy of their local public school.

There were multiple skirmishes in the press over the education issue during the final days of the campaign. The other side claimed the wedding episode wasn't really as we described it, while we defended the ad as accurate and highlighted other examples where gays had forced their agenda into the public schools (including an episode in Hayward where a school celebrated "coming out week" while urging kindergartners to sign pledge cards promising to be an ally of gay students).

After several days of dueling ads featuring Jack O'Connell and kids at the lesbian wedding, the No side effectively conceded they had lost the education debate. They pulled the O'Connell ad and went in a new direction in the final few days--attempting to equate a Yes vote with racial discrimination. One ad with U.S. Sen. Dianne Feinstein said that regardless of how people felt about gay marriage, "we must always oppose" discrimination. They even tried to compare banning gay marriage to interning Japanese Americans during World War II camps in an ad narrated by Samuel L. Jackson.

We decided to not respond to this line of attack, confident that it would backfire. The basic message that supporters of traditional marriage are bigots, guilty of discrimination, had never worked in focus groups. For liberal whites like Feinstein to lecture black Californians about discrimination was not a winning message. We brought into rotation a positive ad that reminded voters, in a non-threatening, calm way about the potential consequences to California, and especially children, if gay marriage was permanently legalized.

As the campaign headed into the final days, we launched a "Google surge." We spent more than a half-million dollars to place ads on every single website that had advertising controlled by Google. Whenever anyone in California went online, they saw one of our ads in the final two days of the election.

We always believed that if we went into Election Day tied or even a point or two behind, that we would win. This was because of the superior nature of our GOTV effort and because the history of polling on the gay marriage issue always understated support for traditional marriage.

Our last pre-election tracking poll showed the race tied at 48 percent on Election morning. We won 52.3 percent to 47.7 percent, a 700,000-vote margin. Post-election polls showed that upwards of 70 percent of African American voters supported Prop 8. Latinos voted Yes by about 56 percent, as did a majority of Asian voters.

Members of the Mormon faith played an important part of the Yes on 8 coalition, but were only a part of our winning coalition. We had the support of virtually the entire faith community in California. Prop 8 didn't win because of the

Mormons. It won because we created superior advertising that defined the issues on our terms; because we built a diverse coalition; and, most importantly, because we activated that coalition at the grassroots level in a way that had never before been done.

The Prop 8 victory proves something that readers of Politics magazine know very well: campaigns matter.

Frank Schubert is president of Schubert Flint Public Affairs. Jeff Flint is a partner at the firm.

COPYRIGHT 2009 Campaigns & Elections, Inc. This material is published under license from the publisher through the Gale Group, Farmington Hills, Michigan. All inquiries regarding rights should be directed to the Gale Group.

©2009 Gale, a part of Cengage Learning. All rights reserved.
www.accessmylibrary.com

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CIVIL MINUTE ORDER

VAUGHN R. WALKER
United States District Chief Judge

DATE: August 19, 2009

COURTROOM DEPUTY: Cora Klein **Court Reporter:** Belle Ball

CASE NO. C 09-2292 VRW

CASE TITLE: KRISTIN PERRY et al v. ARNOLD SCHWARNEGGER et al

COUNSEL FOR PLAINTIFFS:
David Boies, Theodore B Olson
Theodore Boutrous, Christopher Dusseault
Theane Kapur, Enrique Monagas
Jeremy Goldman, Theodore Uno
Matthew D McGill

PLAINTIFF INTERVENORS:
Our Family Coalition:
Shannon P Minter, Christopher Stoll,
James Esseks, Elizabeth Gill,
Matthew Coles, Jennifer Pizer

PLAINTIFF INTERVENOR:
City and County of San Francisco:
Therese Stewart, Christine Van Aken
Erin Bernstein, Dennis Herrera

DEFENDANTS:
Arnold Schwarzenegger, Mark Horton, Linette Scott:
Kenneth C Mennemeier

Edmund G Brown- Attorney General of California:
Gordon Burns, Tamar Pachter

Patrick O'Connell - Clerk Recorder for County of Alameda:
Claude Kolm, Lindsey Stern

Dean C Logan - Registrar Recorder/County Clerk for the County of Los Angeles:
Judy Whitehurst

INTERVENOR DEFENDANTS:
Prop 8 Official Proponents and protectmarriage.com:
Charles J Cooper
David H Thompson
Campaign For California Families:
Rena Lindevaldsen

PROCEEDINGS and RESULTS:

The Court heard argument from counsels and ruled as follows:

1. Motion to intervene as party plaintiffs filed by the Our Family coalition, Doc #79 - denied.
2. Motion for intervention as intervenor-defendant filed by Campaign for California Families, Doc # 91 - denied.
3. Motion to intervene filed by City and County of San Francisco, Doc #109 - granted in part to allow San Francisco to present issue of alleged effect on governmental interests.
4. Trial setting and scheduling as follows:
   a. Designation of witnesses presenting evidence under FRE 702, 703 or 705 and production of written reports pursuant to FRCP 26(a)(2)(B): October 2, 2009;
   b. Dispositive motions to be served and filed so as to be heard on October 14, 2009 at 10 AM;
   c. Completion of all discovery, except for evidence intended solely to contradict or rebut evidence on the same subject matter identified by another party under FRCP 26(a)(2)(B): November 30, 2009;
   d. Completion of discovery on the same subject matter identified by another party under FRCP 26(a)(2)(B): December 31, 2009; see FRCP 26(a)(2)(C)(ii);
   e. Pretrial conference: December 16, 2009 at 10 AM;
   f. Trial: January 11, 2010 at 8:30 AM.
5. With respect to any disputes regarding discovery, counsel are directed to comply with Civ LR 37-1(b) and the court's standing order 1.5.
6. In the absence of the assigned judge, counsel are directed to bring any discovery disputes before Magistrate Judge Joseph C Spero.

Supreme Court, U.S.
FILED
JAN 11 2009
OFFICE OF THE CLERK

NO. 09A648

IN THE UNITED STATES SUPREME COURT

Supreme Court, U.S.
FILED
JAN 11 2010
OFFICE OF THE CLERK

IN RE: DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANNSON, AND PROTECT-MARRIAGE.COM—YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

DENNIS HOLLINGSWORTH, et al.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

KRISTEN M. PERRY, SANDRA B. STIER, PAUL K. KATAMI, JEFFREY J. ZARRILLO, CITY AND COUNTY OF SAN FRANCISCO, NON-PARTY THE MEDIA COALITION, ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, EDMUND G. BROWN, JR., in his official capacity as Attorney General of California, MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics, LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda, DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, and HAK-SHING WILLIAM TAM,
Real Parties in Interest.

On Appeal from the United States District Court
for the Northern District of California

SUPPLEMENTAL BRIEF BY NON-PARTY MEDIA COALITION IN OPPOSITION TO APPLICATION FOR IMMEDIATE STAY OF THE DISTRICT COURT'S ORDER PERMITTING PUBLIC BROADCAST OF TRIAL PROCEEDINGS

THOMAS R. BURKE
Counsel of Record
ROCHELLE L. WILCOX
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, California 94111
(415) 276-6500; (415) 276-6599 fax

Attorneys for Non-Party Media Coalition
ABC NEWS; KGO TV; KABC TV; CABLE NEWS NETWORK; IN SESSION (formerly known as "COURT TV"); FOX NEWS; NBC UNIVERSAL, INC.; CBS NEWS; HEARST CORPORATION; DOW JONES & COMPANY, INC.; THE ASSOCIATED PRESS; and NORTHERN CALIFORNIA CHAPTER OF RADIO & TELEVISION NEWS DIRECTORS ASSOCIATION

TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

The Non-Party Media Coalition, ABC News; KGO TV; KABC TV; Cable News Network; In Session (formerly known as "Court TV"); Fox News; NBC Universal, Inc.; CBS News; Hearst Corporation; Dow Jones & Company, Inc.; The Associated Press; and Northern California Chapter of Radio & Television News Directors Association (the "Media Coalition") respectfully submits the attached letter dated January 10, 2010, from the Honorable Alex Kozinski, Chief Judge of the United States Court of Appeals for the Ninth Circuit, to the Honorable Anthony J. Scirica, Chairman, Executive Committee, Judicial Conference of the United States, and James C. Duff, Esq., Secretary, Judicial Conference of the United States (the "Letter").

As reflected in the attached Letter, it was filed with the district court in this matter on January 11, 2010, as Docket No. 406. The Letter was not available to the Media Coalition when it submitted its Opposition to the Stay Application that is currently pending before the Court. The Letter contains information regarding the decision-making process that led the Ninth Circuit Court of Appeals to adopt the pilot program at issue in this matter, and the Media Coalition believe it will assist the Court in analyzing the Stay Application.

Accordingly, the Media Coalition respectfully requests that the Court permit the filing of this Supplemental Brief.

RESPECTFULLY SUBMITTED this 10th day of January, 2010.

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
ROCHELLE L. WILCOX

By /s/ Thomas R. Burke
Thomas R. Burke

Attorneys for Non-Party Media Coalition ABC NEWS; KGO TV; KABC TV; CABLE NEWS NETWORK; IN SESSION (formerly known as "COURT TV"); FOX NEWS; NBC UNIVERSAL, INC.; CBS NEWS; HEARST CORPORATION; DOW JONES & COMPANY, INC.; THE ASSOCIATED PRESS; and NORTHERN CALIFORNIA CHAPTER OF RADIO & TELEVISION NEWS DIRECTORS ASSOCIATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEX KOZINSKI
Chief Judge

(626) 229-7140
Fax 229-7444

January 10, 2010

The Honorable Anthony J. Scirica
Chairman, Executive Committee
Judicial Conference of the United States
Washington, D.C. 20544

James C. Duff, Esq.
Secretary
Judicial Conference of the United States
Washington, D.C. 20544

Dear Tony and Jim:

Thank you for your letter and your interest. As you probably know, Chief Judge Walker has denied motions by the media to record and broadcast the trial. And, at present, his request to place a video recording of a non-jury civil trial on the Northern District's website is not ripe for decision; necessary technical issues have not yet been resolved. To date, I have therefore only approved real-time streaming of the case to other federal courtrooms, consistent with procedures used in other high-profile cases. Viewers in the other courtrooms will, of course, be prohibited from taking audio or video recordings of the stream.

I believe I can nevertheless allay the general concerns expressed in your letter about the Ninth Circuit's pilot project. The pilot project was developed after considerable deliberation and careful research. As you are aware, there is no Judicial Conference policy prohibiting trial courts from placing video recordings of non-jury civil proceedings on their websites. That policy decision rests exclusively with the Judicial Council of each circuit, consistent with the statutory governance structure of the courts. 28 U.S.C. § 332; *see also Arnster v. U.S. Dist. Ct.*, 806 F.2d 1347, 1349 n.1 (9th Cir. 1986) ("Except for judicial disciplinary proceedings, the Judicial Conference does not have binding or adjudicatory authority over the courts.").

Our Council is well aware that some 22 years ago the Judicial Conference first considered allowing cameras in courtrooms, 20 years ago authorized a pilot program of the same, and 14 years ago adopted a resolution urging the circuits' Judicial Councils not to permit radio and television coverage of proceedings in our district courts. *See* Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 17 (Mar. 12, 1996); Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 15 (Mar. 15, 1994); Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 103–04 (Sept. 12, 1990); Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 34 (Mar. 14, 1989). The issue came before the Judicial Conference in 1994 and 1996 as the result of a study of electronic media coverage of federal civil proceedings conducted by the Federal Judicial Center, which conducted pilot projects allowing the media to record and broadcast trials. The results of the study were positive. The FJC reported that there were "small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice." Federal Judicial Center, *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals* 7 (1994). As a result of the study, the FJC research project staff recommended authorizing cameras in civil proceedings in federal courtrooms nationwide, subject to guidelines. *Id.* at 43.

The decision on this question was ultimately left in the hands of the circuits. *See 1996 Judicial Conference Report, supra*, at 17. In response to the Judicial Conference resolution, the Ninth Circuit Judicial Council adopted a policy in 1996 that prohibits the broadcast of trial court proceedings. However, not all circuits elected to follow the Judicial Conference's suggestion; some courts even adopted rules permitting courts to use video broadcasting equipment. E.D.N.Y. Local Civ. R. 1.8; S.D.N.Y. Local Civ. R. 1.8.

The Judicial Conference resolution also left the question of broadcasting federal appellate proceedings to each Court of Appeals. In response, the Ninth

Circuit Court of Appeals adopted a resolution in 1996 that allows the recording and broadcast of appellate arguments, subject to conditions. Since that time, hundreds of appellate arguments have been recorded and broadcast without incident.

The FJC study, and the Judicial Conference resolution, were focused exclusively on electronic coverage of the courts by the media. The Judicial Conference did not—and has not—considered video recording and dissemination by court units. Thus, the request by the Northern District of California to record and distribute video under the careful control of the court—not the broadcast media—involves circumstances far different from those considered by the Judicial Conference so long ago: New, cheaper video technology has made it possible for courts to control that which only the media could have controlled in 1996.

While the Judicial Conference has not formally considered this matter in the intervening decade and a half, a great deal has happened in the world since then, notably the advent of affordable video systems and the proliferation of the internet. Technology has changed the way trials are conducted and reported. The public, too, demands far more transparency from its public institutions today than it did in 1996. *E.g.*, Op. Ed., *Federal Courts Should Join 21st Century*, DES MOINES REGISTER (Jan. 8, 2010) (attached).

Our court, and most others, has responded to these public demands. We make digital audio recordings of each appellate argument available to the public on our website. A substantial number of arguments are video recorded and broadcast. We post all of our decisions, precedential and non-precedential, on our website. I post all of my decisions on judicial misconduct complaints, with appropriate redactions to preserve privacy, on our website. Our Circuit Council has recently adopted provisional guidelines for the use of electronic devices in courtrooms by jurors, media and the bar. Simulcasting of district court proceedings has become fairly common, especially in high profile cases in which courtroom space is limited. Even the Supreme Court is now releasing audio recordings—sometimes in near-realtime.

In short, the public has demanded greater access to our courtrooms, we have provided it and it has not caused problems.

All states allow media broadcast of court proceedings in some form. Some states have even imposed great restrictions on state trial judges' discretion to limit broadcasting. For example, Montana has incorporated a requirement for media access into its code of judicial conduct, making it an act of judicial misconduct to *refuse* without good cause any request by the media to broadcast court proceedings. Canon 35, *Montana Canons of Judicial Ethics*. As you are aware, legislation is now pending before Congress that would authorize or require federal courts to allow media recording and broadcast of court proceedings. *See* Sunshine in the Courtroom Act of 2009 (S. 657); Sunshine in the Courtroom Act of 2009 (H.R. 3054); *see also* http://jnet.ao.dcn/Legislation/Cameras_in_the_Courtroom.html. If we do not respond to the legitimate public expectations, we create a serious risk that Congress will impose camera requirements on the courts based on guidelines developed outside the court system.

In light of developments such as these, the Judicial Conference of the Ninth Circuit began debating how to respond at its 2007 meeting. It voted to have the current Ninth Circuit rule, which prohibits all cameras in district courts, reconsidered. Lawyers and judges, voting separately, approved the resolution by resounding margins. This sentiment reflects the strong view of our bar, as evidenced by the many resolutions we have received from various bar associations throughout our Circuit. *E.g.*, Letter of the Federal Bar Association of the Northern District of California to Judge Hamilton and Chief Judge Walker (Jan. 7, 2010) (attached).

Following the vote of the Ninth Circuit Judicial Conference, the Ninth Circuit Judicial Council passed a resolution urging the Judicial Conference to re-examine its historical opposition to video technology and endorse video recording and broadcasting of non-jury civil cases. The Judicial Conference Committee on Court Administration and Case Management (CACM) examined the request at its June 2009 meeting. It deferred formal action, but noted that "the limitations

inherent to the proposal (i.e., non-jury civil cases) would avoid many of the concerns of the Conference . . . and [the proposal] was therefore much more akin to what is already permitted in circuit courts." *CACM Report to the Judicial Conference of the United States, reprinted in Agenda of the Judicial Council of the Ninth Circuit* 7 (Oct. 22, 2009). Although the Committee was not unanimous in its view, it reported to the Judicial Conference that "the Committee also appears to be supportive of camera proposals in general that grant full discretion to the district judge, that allow for protection of the images of jurors and witnesses, and that proceed only with great care in criminal cases." *Id.* at 7–8. The matter was referred to the Judicial Conference's Executive Committee before its August 2009 meeting, but it declined, without explanation, to place it on the agenda for the September 2009 meeting of the Judicial Conference. *See* Judicial Conference Executive Committee, *Memorandum of Action* 2 (Aug. 20, 2009).

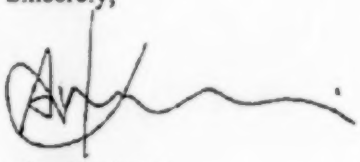
After extensive deliberation, and mindful of these considerations, our Judicial Council voted to approve a carefully-controlled pilot program to experiment with the use of video in non-jury civil cases. This approach, as the CACM report noted, is very limited and designed to avoid the concerns expressed by the Judicial Conference a decade and a half ago. The Council will use the experience gained during the pilot program to consider whether to adopt a permanent rule.

We hope and trust that other federal circuits and the Judicial Conference will take advantage of our experience when they reconsider the matter, as we believe they soon must. Like it or not, we are now well into the Twenty-First Century, and it is up to those of us who lead the federal judiciary to adopt policies that are consistent with the spirit of the times and the advantages afforded us by new technology. If we do not, Congress will do it for us.

Let me assure you that we will be proceeding with great caution. Every project is subject to my personal approval, and I am examining the details of each proposal meticulously. If and when the request from the Northern District of

California becomes ripe for my consideration, you may rest assured that I will examine all aspects of it with great care.

Sincerely,



Alex Kozinski

AK/dms

Attachments

cc: Ninth Circuit Judicial Council
The Honorable Vaughn R. Walker
Chief Judges, United States Courts of Appeals
Circuit Executives

DesMoinesRegister.com

January 8, 2010

Federal courts should join 21st century

The great divide seems to grow ever wider between federal courts and the rest of the world on cameras in courtrooms. On one side are federal court policymakers who fear cameras would transform every trial into a media frenzy on the order of the 1994 O. J. Simpson trial. On the other side are growing numbers of Americans who naturally assume images of almost everything that happens nowadays will be captured on television or online.

Somewhere in between those extremes are federal trial judges, many if not most of whom either believe cameras during trials would be harmless or would improve public understanding of the courts. The most recent evidence: the nine northwestern states of the 9th U.S. Circuit have agreed to a limited test of cameras in some civil trials. If judges are comfortable with the experiment, it could be permanent. In fact, this could cause other federal courts across the country to follow suit. And they should.

Federal courtrooms should be more accessible to the public through modern communications technology. Indeed, all courts - federal and state - must review existing rules regarding the use of the growing array of communications devices, from texts to Twitter to cell-phone video.

The courts cannot wall themselves off from public scrutiny with antiquated rules. People have a right to know what goes on in courts, and they will better appreciate the role of the courts if they can see them in action. Modern technology makes that possible far beyond the limited numbers who can actually get to a courthouse to observe trials in person.

State courts reached this conclusion long ago. All 50 states allow cameras in at least some courtrooms, and most states allow electronic media coverage of civil and criminal trials. Since 1980, Iowa has allowed television cameras, newspaper photographers and other recording devices in state criminal, civil and appellate courts. This practice has had broad, consistent support among trial judges, lawyers and court administrators.

It's time the federal courts joined this movement.

The experiment with cameras in the 9th Circuit - which encompasses federal courts from Alaska to Arizona - is noteworthy because it's at odds with the position of the U.S. Judicial Conference, the chief policy-making body for all federal courts. The Judicial Conference, which is composed of chief judges from the 12 regional circuits and chaired by the chief justice of the United States, has with one exception opposed cameras in trial courts. That exception was a three-year experiment beginning in 1991, which most participating judges recommended continuing. Nonetheless, the conference voted to maintain the ban on cameras in trial courts in place since 1946.

Federal courts have some authority to set their own rules at the local level, and the 9th Circuit may be testing the limits of that authority. As with many cultural trends, this move by judges in the West and Northwest might spread across the rest of the federal court system.

It's about time.

Additional Facts

Federal courts in Iowa

Cameras are prohibited in all federal courts in Iowa under rules of the Judicial Council for the 8th U.S. Circuit, which covers seven Midwest states. The council is composed of 10 judges of the 8th Circuit U.S. Court of Appeals and 10 U.S. District Court judges in the circuit. The council is chaired by

Chief Appeals Court Judge James B. Loken.

•Tell judges what you think about cameras

If you agree that federal courts in Iowa should be open to electronic media coverage, let court officials know. Contact the Office of the Circuit Executive, Thomas F. Eagleton Courthouse, 111 South 10th St., St. Louis, Mo. 63102. Phone: (314) 244-2600. Fax: (314) 244-2605.

FEDERAL BAR ASSOCIATION
NORTHERN DISTRICT OF CALIFORNIA CHAPTER

OFFICERS

President
Judith Anderson
Securities and Exchange Commission
44 Montgomery Street, Suite 2600
San Francisco, CA 94104
415/705-2500
AndersonJu@sec.gov

Vice President, San Francisco
Gregory N. Owen
Owen, Wickersham & Erickson, P.C.
455 Market Street, Suite 1910
San Francisco, CA 94105
415/882-3200
gowen@owe.com

Vice President, Oakland
Valerie Stewart
Federal Bureau of Prisons
7338 Shoreline Dr.
Stockton, CA 95219
209/956-9733
vlstewart@bop.gov

Vice President, San Jose
Jason de Bretteville
Sullivan & Cromwell LLP
1870 Embarcadero Road
Palo Alto, California 94303
1-650/461-5600
debrettevillej@sullcrom.com

Secretary/Treasurer
Timothy K. Roake
Gibson, Dunn & Crutcher LLP
1881 Page Mill Road
Palo Alto, CA 94304
650/849-5382
troake@gibsondunn.com

President Elect
David H. Fry
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco CA 94105
415/512-4000
David.Fry@mto.com

January 7, 2010

The Honorable Phyllis Hamilton
Chair of the Rules Committee for the Northern District of California
United States Courthouse
1301 Clay Street
Oakland, CA 94612

The Honorable Vaughn Walker
Chief Judge, Northern District of California
United States Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102

Dear Judge Hamilton and Chief Judge Walker:

On behalf of the Executive Committee of the Northern District of California Chapter to the Federal Bar Association, I write to express our support for the revision of Local Rule 77-3, effective December 22, 2009. The revisions to Local Rule 77-3 are necessary and appropriate to implement the pilot program allowing, on an experimental basis, the limited use of cameras in federal district courts within the circuit that was approved unanimously by the Judicial Council of the Ninth Circuit on December 17, 2009.

The Judicial Council's action follows a resolution supporting the use of cameras passed by judges and lawyers attending the 2007 Ninth Circuit Judicial Conference. We share the view that allowing the pilot program to move forward, subject to the sound discretion of the District Judges, will be useful and is important. It will offer a basis to evaluate whether the use of cameras significantly improves public access to court proceedings. Exploring the experimental use of cameras in the courtroom will contribute to better understanding of how federal courts can best ensure that the right to public access is fostered in practical and meaningful ways. Public access to federal court proceedings, with only extremely limited exceptions, is a bedrock principle and firmly established constitutional right. As our society changes and public access to federal courts can be more difficult in light of increased security concerns and numerous other factors, the

Immediate Past President
Christopher D. Sullivan
McGrane Greenfield LLP
One Ferry Building, Suite 220
San Francisco, CA 94111
415/283-1776
csullivan@mcgranegreenfield.com

HONORARY OFFICERS

The Hon. Vaughn R. Walker
Chief Judge
United States District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102
415/522-2000

Joseph P. Russoniello, Esq.
United States Attorney
U.S. Attorney's Office
450 Golden Gate Avenue, 11th Fl.
P.O. Box 36055
San Francisco, CA 94102
415/436-7200

Barry J. Portman, Esq.
Federal Public Defender
450 Golden Gate Avenue, Rm. 17424
P.O. Box 36106
San Francisco, CA 94102
415/436-7700

STEERING COMMITTEE

The Hon. Laurel Beeler
Stephen Paul Berzon
Asim Bhansali
Martha Boersch
Peter Boutin
Elizabeth Brancart
Elizabeth J. Cabraser
Richard C. Darwin
Bruce S. Flushman
David Fry
David Girard
Matthew Jacobs
Randall T. Kim
Erik Khoobyarian
Rory K. Little
Otis McGee
Kathleen Morris
Sharon L. O'Grady
Scott Raber
Patrick Robbins
Joseph P. Russoniello
Stephen L. Schirle
Christopher Steskal
Sanford Svetcov

potential that public access can be improved through the use of courtroom cameras should be tested.

We also think that the timely revisions to Local Rule 77-3, in light of the recent adoption of the pilot program by the Judicial Council of the Ninth Circuit, are justified by the "immediate need" provision of Title 28 U.S.C. Sec. 2071(e). We support the efforts of the bench of the Northern District to address these issues quickly. We share Chief Judge Kozinski's goal of achieving a better public understanding of our judicial processes and enhanced confidence in the rule of law, and we endorse exploring the use of cameras in the courtroom as a way to achieve that goal.

Thank you for considering our views on the revisions to Local Rule 77-3.

Sincerely,

Christopher D. Sullivan
Immediate Past President

c.c. The Honorable Alex Kozinski
Chief Judge of the Ninth Circuit Court of Appeals

(4)

No. 09A648

IN THE UNITED STATES SUPREME COURT

IN RE: DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANNSON, AND PROTECT-MARRIAGE.COM—YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

DENNIS HOLLINGSWORTH, et al., *Petitioners*

v.

KRISTEN M. PERRY, SANDRA B. STIER, PAUL K. KATAMI, JEFFREY J. ZARRILLO, CITY AND COUNTY OF SAN FRANCISCO, NON-PARTY THE MEDIA COALITION, ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, EDMUND G. BROWN, JR., in his official capacity as Attorney General of California, MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics, LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda, DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, and HAK-SHING WILLIAM TAM, *Respondents*.

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR IMMEDIATE STAY OF THE DISTRICT COURT'S ORDER PERMITTING PUBLIC BROADCAST OF TRIAL PROCEEDINGS

Andrew P. Pugno
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Drive, Suite 100
Folsom, California 95630
(916) 608-3065; (916) 608-3066 Fax

Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020; (480) 444-0028 Fax

Charles J. Cooper
Counsel of Record
Michael W. Kirk
Jesse Panuccio
COOPER AND KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600; (202) 220-9601 Fax

Attorneys for Petitioners

Petitioners respectfully submit this supplemental brief in support of their application for an immediate stay of the district court's order permitting public broadcast of the proceedings to address developments that came to light yesterday. At the outset of the trial yesterday, the district court offered a further explanation of its plans, and it also filed a number of comments the court received supporting public broadcast (but it did not file any of the comments opposing broadcast). The court also filed a copy of a January 8, 2010, letter from the Honorable Anthony J. Scirica, Chairman of the Executive Committee of the Judicial Conference of the United States and Chief Judge of the United States Court of Appeals for the Third Circuit, and James C. Duff, Secretary of the Judicial Conference of the United States, to the Honorable Alex Kozinski, Chief Judge of the United States Court of Appeals for the Ninth Circuit ("Letter of Chief Judge Scirica and Mr. Duff"), and Chief Judge Kozinski's January 10, 2010, letter in response ("Letter of Chief Judge Kozinski").[1]

1. Both the district court and Chief Judge Kozinski stated that they believe the Judicial Conference's policy on this matter is outdated and should be changed. *See* Tr. of Hr'g at 13-14 (Jan. 11, 2010); Letter of Chief Judge Kozinski at 4-5. Whatever the merit of their policy views on this question, the precipitate manner in which the governing rules and procedures have been revised and then applied to permit broadcast of the trial in this case is unlawful and should not be permitted to stand. The district court acknowledged yesterday that "the concerns that the proponents have raised here are concerns that should be considered, need to be considered, and in due course should be given thorough consideration." Tr. of Hr'g at 14 (Jan. 11, 2010). But as Congress recognized in prescribing 28 U.S.C. §§ 332(d)(1) and 2071(b), and as this Court

[1] The transcript of the district court's statement appears as Exhibit 1 to the supplemental letter submitted to the Court by Mr. Olson last night, Chief Judge Scirica and Mr. Duff's letter appears as Exhibit 7, and Chief Judge Kozinski's letter appears as Exhibit 8.

recognized in promulgating FED. R. CIV. P. 83(a)(1), it is imperative that full consideration be given to such concerns *before* the changes are adopted. That is especially so where, as here, the change would lead to a policy that, the Judicial Conference of the United States has repeatedly concluded, poses an unacceptably high risk of denying litigants their right to a fair trial.

2. It appears that the plan for broadcasting the trial proceedings in this case has been revised somewhat over the weekend. In his January 10 letter, Chief Judge Kozinski indicated that the district court has "request[ed] to place a video recording of a non-jury civil trial on the Northern District's website." Letter of Chief Judge Kozinski at 1. Similarly, the district court declared yesterday, "What the Court has contemplated and what the Ninth Circuit pilot project contemplates is a posting on the Northern District of California website. It is not a Google YouTube posting that may be commonly understood." Tr. of Hr'g at 10 (Jan. 11, 2010). These descriptions of the broadcast plan differ from the district court's previous description; before yesterday, it was clear that the district court intended that the trial proceedings would be available on YouTube. *See* Tr. of Hr'g at 4, 6 (Jan. 6, 2010) (CA App. (Petitioners' Exhibit B), Ex. 2) (statement of "IT manager for the District Court" that video of the proceedings would be "uploaded to YouTube"); *id.* at 6, 8-9 (court had "started up a YouTube channel" and provided the publicly available "YouTube address"—"youtube.com/usdccand"—where the video could be viewed); *id.* at 17 (district court statement that "the second step of the process" would be "the transmission of these proceedings on a delayed basis to YouTube, for purposes of posting on the Internet so the proceedings can be made generally available.").

Both Chief Judge Kozinski and the district court sought to draw a distinction between posting the video on the district court's website and other means of public dissemination. But Chief Judge Scirica and Mr. Duff reemphasized, in their letter to Chief Judge Kozinski, that "the

Judicial Conference policy ... does not allow courtroom proceedings in civil and criminal trials in district courts to be broadcast, televised, recorded or photographed *for the purpose of public dissemination*." Letter of Chief Judge Scirica and Mr. Duff (emphasis added). In response, Chief Judge Kozinski asserted that "[t]he Judicial Conference did not—and has not—considered video recording and dissemination by court units. Thus, the request by the Northern District of California to record and distribute video under the careful control of the court—not the broadcast media—involves circumstances far different from those considered by the Judicial Conference so long ago." Letter of Chief Judge Kozinski at 3.

We respectfully submit that there is no meaningful distinction between posting a video recording of a trial on the Internet and disseminating it through other means of mass distribution. The concerns driving the Judicial Conference's policy all arise from the impact that video distribution of trial proceedings to millions of people may have on witnesses, lawyers, and judges. That impact is the same regardless of whether the video is disseminated via television or via the Internet. As Chief Judge Scirica and Mr. Duff emphasized, the object of the Judicial Conference policy is "public dissemination" of a video recording of trial proceedings, whatever the means.

Nor is there any meaningful distinction between posting a video on YouTube and posting a video on the district court's website. The "control" that the district court assertedly would have over the video when it is on its own website is entirely illusory. Once a video is posted on a website—whether YouTube, the district court's, or another—it can easily be altered and disseminated widely by those with modest technical skill. Moreover, the specific web address of the public broadcast will hardly make a difference to a fearful or overeager witness or a grandstanding lawyer; the harm comes from the broadcast itself, not its Internet address. Nor

does the advent of new media technologies diminish the force of the Judicial Conference's carefully considered policy. If anything, by making video manipulation and distribution so easy, new media technologies have amplified the risk of irreparable harm to which the Judicial Conference was so sensitive in the quaint era of television and radio.

3. Chief Judge Kozinski also stated that the district court's "request to place a video recording of a non-jury civil trial on the Northern District's website is not ripe for decision; necessary technical issues have not yet been resolved." Letter of Chief Judge Kozinski at 1. That remark should not be thought to render this stay application premature. Both the trial court and Chief Judge Kozinski have already authorized live broadcast of the trial to courthouses around the country, which apparently was unaffected by the technical issues and would have proceeded yesterday but for this Court's temporary stay. Moreover, nothing in Chief Judge Kozinski's letter suggests that he and the district court will not proceed with the contemplated broadcast of the trial proceedings here as soon as the necessary technical issues have been resolved. Rather, according to the district court, Chief Judge Kozinski "worked very hard over the weekend with the Court's technical staff to resolve those issues." Tr. of Hr'g at 12-13 (Jan. 11, 2010).

CONCLUSION

For the foregoing reasons and the reasons previously stated, the Court should stay the district court's order permitting the proceedings in this case to be broadcast beyond the confines of the Northern District of California courtroom.

January 12, 2010

Respectfully Submitted,

s/ Charles J. Cooper

Charles J. Cooper
Michael W. Kirk
Jesse Panuccio
COOPER & KIRK PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020

Counsel for Petitioners

Andrew P. Pugno
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Dr., Ste. 100
Folsom, CA 95630
(916) 608-3065

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January 2010, I caused to be served on the following counsel a true and correct copy of the foregoing via electronic mail:

Kenneth C. Mennemeier
Andrew W. Stroud
MENNEMEIER, GLASSMAN & STROUD LLP
980 9th Street, Suite 1700
Sacramento, CA 95814-2736
kcm@mgslaw.com
gosling@mgslaw.com
aknight@mgslaw.com
stroud@mgslaw.com
lbailey@mgslaw.com

Attorneys for the Administration Defendants

Gordon Burns
Tamar Pachter
OFFICE OF THE ATTORNEY GENERAL
1300 I Street, Suite 125
P.O Box. 944255
Sacramento, CA 94244-2550
Gordon.Burns@doj.ca.gov
Tamar.Pachter@doj.ca.gov

Attorneys for Defendant Attorney General Edmund G. Brown, Jr.

Dennis J. Herrera
Therese M. Stewart
OFFICE OF THE CITY ATTORNEY
City Hall, Room 234
One Dr. Carlon B. Goodlett Place
San Francisco, California 94102-4682
therese.stewart@sfgov.org
erin.bernstein@sfgov.org
vince.chhabria@sfgov.org
danny.chou@sfgov.org
ronald.flynn@sfgov.org
mollie.lee@sfgov.org
Christine.van.aken@sfgov.org
catheryn.daly@sfgov.org

Attorneys for Plaintiff-Intervenor City and County of San Francisco

Elizabeth M. Cortez
Judy W. Whitehurts
THE OFFICE OF CITY COUNSEL
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012-2713
jwhitehurst@counsel.lacounty.gov

Attorneys for Defendant Dean C. Logan Registrar-Recorder/County Clerk, County of Los Angeles

Richard E Winnie
Brian E. Washington
Claude F. Kolm
Manuel F. Martinez
THE OFFICE OF CITY COUNSEL
1221 Oak Street, Suite 450
Oakland, California 94612
Brian.washington@acgov.org
Claude.kolm@acgov.org

Ted Olson
Matthew McGill
Amir Tayrani
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
T: (202) 955-8500
F: (202) 467-0539
TOlson@gibsondunn.com

Lindsey.stern@acgov.org
Judith.martinez@acgov.org

Attorneys for Defendant Patrick O'Connell Clerk Recorder of the County of Alemeda

Terry L. Thompson
LAW OFFICE OF TERRY L. THOMPSON
P.O. Box 1346
Alamo, CA 94507
T: (925) 855-1507
F: (925) 820-6035
tl_thompson@earthlink.net

Attorney for Defendant-Intervenor Hak-Shing William Tam

MMcGill@gibsondunn.com
ATayrani@gibsondunn.com

Theodore Boustrous, Jr.
Christopher Dusseault
Theane Kapur
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90072-1512
T: (213) 229-7000
F: (213) 229-7520
TBoutrous@gibsondunn.com
CDusseault@gibsondunn.com
TKapur@gibsondunn.com
SMalzahn@gibsondunn.com

Ethan Dettmer
Enrique Monagas
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105
T: (415) 393-8200
F: (415) 393-8306
EDettmer@gibsondunn.com
SPiepmeier@gibsondunn.com
EMonagas@gibsondunn.com
RJustice@gibsondunn.com
MJanky@gibsondunn.com

Theodore Uno
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612
T: (510) 874-1000
F: (510) 874-1460
jgoldman@bsfllp.com
tuno@bsfllp.com
brichardson@bsfllp.com
rbettan@bsfllp.com
jischiller@bsfllp.com

Attorneys for Plaintiff Kristin M. Perry

s/Charles J. Cooper
Charles J. Cooper

No. 09A648

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,

Applicants,

v.

KRISTIN M. PERRY, ET AL.,

Respondents.

RESPONSE OF KRISTIN M. PERRY ET AL. TO APPLICATION FOR IMMEDIATE STAY

THEODORE J. BOUTROUS, JR.
THEANE EVANGELIS KAPUR
ENRIQUE A. MONAGAS
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7804

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY 2

II. REASONS FOR DENYING THE STAY 7

A. Proponents' Request For A Stay Is Premature 8

B. There Is No Reasonable Probability That This Court Would Grant Certiorari And Reverse The Court Of Appeals' Denial Of Proponents' Mandamus Petition 9

C. Proponents Will Not Be Irreparably Harmed In The Absence Of A Stay 17

D. The Balance Of Equities Weighs Against A Stay 18

III. CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

ABC, Inc. v. Stewart,
360 F.3d 90 (2d Cir. 2004) 19

Armster v. U.S. Dist. Court,
806 F.2d 1347 (9th Cir. 1986) 13

Chandler v. Florida,
449 U.S. 560 (1981) 16, 17

Cheney v. U.S. Dist. Court,
542 U.S. 367 (2004) 10, 11, 12, 16

Conkright v. Frommert,
129 S. Ct. 1861 (2009) 7

Craig v. Harney,
331 U.S. 367 (1947) 18

Globe Newspaper Co. v. Superior Court,
457 U.S. 596 (1982) 18

Kerr v. U.S. Dist. Court,
426 U.S. 394 (1976) 10

McNabb v. United States,
318 U.S. 332 (1943) 10

In re Pilot Dist. Court Public Access Program Approved December 16, 2009, No. 2010-2 (9th Cir. Jan. 8, 2010) 7

Press-Enterprise Co. v. Superior Court,
464 U.S. 501 (1984) 19

Richmond Newspapers v. Virginia,
448 U.S. 555 (1980) 18

In re Sony BMG Music Entertainment,
564 F.3d 1 (1st Cir. 2009) 13, 14

United States v. Criden,
648 F.2d 814 (3d Cir. 1981) 15

United States v. Terry,
11 F 3d 110 (9th Cir. 1993) 12, 13

Zablocki v. Redhail,
434 U.S. 374 (1978) 1

Statutes

28 U.S.C. § 332(d)(1) 11

28 U.S.C. § 2071(c) 5, 12

Rules

E.D.N.Y. Local Civ. R. 1.8 13

S. Ct. R. 10(a) 10

S.D.N.Y. Local Civ. R. 1.8 13

Other Authorities

David Blankenhorn, *Protecting Marriage to Protect Children*,
L.A. Times, Sept. 19, 2008 14

The Judicial Council of the Ninth Circuit, *at* http://www.ce9.uscourts.gov/
judicial_council.html 4

News Release, Federal Courthouses to Offer Remote Viewing of
Proposition 8 Trial (Jan. 8, 2010),
at http://www.ce9.uscourts.gov/index.html 7

U.S. Court of Appeals for the Ninth Circuit, *Guidelines for Photographing, Recording, and Broadcasting in the Courtroom*,
at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000110 3

TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo ("Plaintiffs") respectfully submit this response to the Application for Immediate Stay of Proposition 8 Official Proponents ("Proponents").

The application should be denied because this case is a sound candidate for inclusion in the Ninth Circuit's pilot camera program. This case directly implicates the rights of the hundreds of thousands of gay and lesbian Californians whose right to marry was extinguished by Proposition 8 ("Prop. 8") – an arbitrary, irrational, and discriminatory measure that singles out gay and lesbian individuals for unequal treatment and excludes them from what this Court has recognized to be "the most important relation in life." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (internal quotation marks omitted). There has been overwhelming public interest in this case since its inception. The district court's decision to include the case in the Ninth Circuit's pilot program is a reasonable—and lawful—means of providing the public with meaningful access to the trial proceedings and fostering public confidence in the outcome of this closely watched case. Because it is impossible to identify any basis on which Proponents could conceivably obtain this Court's review of that decision—and because Proponents would not suffer any irreparable harm from the recording of the trial proceedings for public distribution in other courtrooms and on the Internet—Proponents have not established that a stay is warranted.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs are gay and lesbian Californians who have filed suit in the United States District Court for the Northern District of California challenging Prop. 8—the California constitutional amendment that denies them the right to marry—under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. A trial on Plaintiffs' claims will commence tomorrow, Monday, January 11, 2010.

Proponents were responsible for placing Prop. 8 on the ballot, orchestrated a $40 million campaign to secure its passage, and have since touted their political victory in numerous public appearances and news articles. Proponents have also voluntarily intervened in this case. But now, on the eve of trial—and after months of notice that the trial may be videotaped and distributed publicly—Proponents seek to sharply limit the public's ability to witness the trial proceedings.

Chief Judge Walker's considered request to record the trial proceedings for public distribution in other courtrooms and on the Internet was reached after months of notice and many opportunities for all parties to be heard on the issue. In addition, that decision is the result of years of study and deliberation by the Ninth Circuit on the issue of broadcasting court proceedings. Indeed, as far back as 2007, the Ninth Circuit Judicial Council adopted a resolution recommending that the Judicial Conference of the United States endorse the broadcast of civil trials and recommending that the circuit "adopt a Rule that would allow the photographing, recording, and broadcasting of non-jury, civil proceedings before the District Courts in the Ninth Circuit." C.A. App. Ex. 5. And, the

Ninth Circuit itself has permitted the broadcast of oral arguments in cases of widespread public interest since 1996. *See* U.S. Court of Appeals for the Ninth Circuit, *Guidelines for Photographing, Recording, and Broadcasting in the Courtroom, at* http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000110 (Supp. App. Ex. 1).

The public interest in this historic case has been overwhelming from the outset. Due to that widespread public interest, Chief Judge Walker informed the parties as early as September 25, 2009—long before any witnesses were designated—of the court's desire to "set up an arrangement whereby the images of counsel, the witness, and the judge can be relayed into another courtroom . . . which has a substantial amount of seating capacity." C.A. App. Ex. 9, at 69. When Chief Judge Walker pointed out at the September 25 hearing that there were three cameras in the courtroom positioned "approximately where they would be" during the trial and asked if anyone had an objection, the parties—including Proponents—stated that they did not. *Id.* at 70; *see also id.* ("No objection. None at all."). Thus, Proponents had notice of cameras in the courtroom as early as September, and they did not object.

During the September 25 hearing, Chief Judge Walker also explained that he had "received some inquiries . . . about projecting this image even beyond an overflow courtroom." C.A. App. Ex. 9, at 70. He asked the parties to consider that possibility and inform the court of their views. He also noted that "what we do is open and public and should be, but we want to do it in a way that's consistent with the rights of the parties and the appropriate decorum and dignity of the judicial process." *Id.*

On October 2, 2009, Plaintiffs submitted a letter to the court stating that they supported the contemplated video transmission of the proceedings beyond the overflow courtroom. C.A. App. Ex. 10. In addition, Plaintiff-Intervenor City of San Francisco, Defendant California Attorney General Edmund G. Brown, and Defendants Counties of Los Angeles and Alameda supported Plaintiffs' position. *Id.* On October 5, 2009, Proponents submitted a letter expressing their opposition to video transmission of the proceedings. C.A. App. Ex. 11.

On October 22, 2009, "Chief Judge Kozinski . . . appointed a committee to evaluate the possibility of adopting a Ninth Circuit rule" regarding the recording and transmission of district court proceedings. C.A. App. Ex. 2, at 43. The committee consisted of Circuit Judge Sidney Thomas, Chief Judge Audrey Collins of the Central District of California, and Chief Judge Walker. *Id.* at 44. The committee "made a recommendation to the Ninth Circuit Judicial Council, which *unanimously* adopted the rule . . . permitting a pilot project" regarding the recording and transmission of civil non-jury trials. *Id.* (emphasis added).[1]

---

[1] The Ninth Circuit Judicial Council consists of eleven judges: Chief Judge Alex Kozinski, Senior Circuit Judge Proctor Hug, Jr., Circuit Judge Sidney R. Thomas, Circuit Judge M. Margaret McKeown, Circuit Judge Johnnie B. Rawlinson, Circuit Judge Ronald M. Gould, Senior District Judge Robert H. Whaley, Chief District Judge Roger L. Hunt, Chief District Judge Irma E. Gonzalez, Chief District Judge Audrey B. Collins, and Senior District Judge Terry J. Hatter, Jr. Chief Judge Walker is one of the nine non-voting observers of the Council. *See* The Judicial Council of the Ninth Circuit, *at* http://www.ce9.uscourts.gov/ judicial_council.html.

On December 17, 2009, the Ninth Circuit Judicial Council announced its decision to establish a pilot program that "allow[s] the 15 district courts within the Ninth Circuit to experiment with the dissemination of video recordings in civil non-jury matters." C.A. App. Ex. 13. Cases to be included in the program "will be selected by the chief judge of the district court in consultation with the chief circuit judge." *Id.*

In light of that authorization, the Northern District revised its Local Rule 77-3 on December 22, 2009, to provide that, "[u]nless allowed by a Judge or a Magistrate Judge . . . *for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit*, the taking of photographs, public broadcasting or televising . . . in connection with any judicial proceeding[ ] is prohibited." C.A. App. Ex. 14 (revisions italicized). As Chief Judge Walker explained during the January 6 hearing in this case, the Northern District "amended Local Rule 77-3, to permit participation in that Ninth Circuit pilot project. At that time, we considered that to be a conforming amendment. Our rules, of course, conform and must conform to the Federal rules and to the Ninth Circuit rules." C.A. App. Ex. 2, at 44.

In accordance with the requirements of 28 U.S.C. § 2071(e), the Northern District provided public notice and an opportunity to comment on the revision to Local Rule 77-3, setting January 8, 2010, as the deadline for comments. C.A. App. Ex. 17. Plaintiffs and Proponents also submitted letters to the district court expressing their respective positions on the amendment and the recording of the proceedings. *See* Doc # 327 (Supp. App. Ex. 2); C.A. App. Ex. 15; C.A. App. Ex. 18.

On January 6, 2010, the district court held a hearing regarding the video recording of the trial and possible transmission beyond the courthouse. At the hearing, the court proposed recording the trial proceedings using three small video cameras—the same cameras to which Proponents did not object during the September 25 hearing (C.A. App. Ex. 9, at 69-70)—and transmitting the images to an overflow courtroom in the Northern District of California's San Francisco courthouse and to other federal courthouses across the country; the court further proposed making the images available (after a delay of up to twenty-four hours) on YouTube, a popular Internet site that disseminates video footage to the general public. C.A. App. Ex. 2, at 16; *see also id.* at 6. The district court also denied a request, however, by a broad media coalition to broadcast the proceedings live on television, explaining that "it's important for this process to be completely under the Court's control, to permit the Court to stop it if that proves to be a problem, if it proves to be a distraction, if it proves to create problems with witnesses." *Id.* at 45.

The district court formally notified the parties on January 7, 2010, that, pending the approval of Chief Judge Kozinski, video recordings of the trial proceedings would be transmitted in accordance with the plan set forth by the court at the hearing a day earlier. C.A. App. Ex. 1. On January 8, Proponents filed a petition for a writ of mandamus in the Ninth Circuit seeking an order barring the recording of the trial proceedings for public distribution in other courtrooms and on the Internet. After calling for a response from Plaintiffs, the court of appeals denied the petition the same day. Proponents' Ex. A.

Also on January 8, Chief Judge Kozinski issued an order authorizing the broadcast of the trial proceedings to selected courthouses. The order did not, however, authorize

the district court to make the recordings available on the Internet, noting only that "[t]he request for posting the files of the videos on the district court's website is still pending." *In re Pilot Dist. Court Public Access Program Approved December 16, 2009*, No. 2010-2 (9th Cir. Jan. 8, 2010) (Kozinski, C.J.) (Supp. App. Ex. 3). In a press release regarding the video transmissions issued the same day, the Ninth Circuit explained that the district court "will fully control the process" and that "Judge Walker has reserved the right to terminate any part of the audio, or video, or both, for any duration," or to terminate participation in the pilot program "at any time." News Release, Federal Courthouses to Offer Remote Viewing of Proposition 8 Trial (Jan. 8, 2010), *at* http://www.ce9.uscourts.gov/index.html (Supp. App. Ex. 4).

On Saturday, January 9, 2010, Proponents filed their application requesting a stay pending the filing and disposition of a petition for a writ of certiorari from the Ninth Circuit's order denying a writ of mandamus. At the time of this filing, the district court's request to publicly distribute the recorded trial proceedings on the Internet remains pending before Chief Judge Kozinski.

II. REASONS FOR DENYING THE STAY

"Denial of . . . in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 129 S. Ct. 1861, 1861 (2009) (Ginsburg, J., Circuit Justice). To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, "the applicant must demonstrate (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that

the decision below was erroneous; and (3) a likelihood that irreparable harm [will] result from the denial of a stay. In addition, in a close case it may be appropriate to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* at 1861-62 (internal quotation marks omitted; alteration in original). Each of those factors weighs strongly against a stay in this case.

A. Proponents' Request For A Stay Is Premature.

As an initial matter, Proponents' stay application should be denied because it is premature. Proponents seek a stay of "the district court's order permitting the proceedings in this case to be publicly broadcast on YouTube." Stay App. 25. Under the terms of the Ninth Circuit Judicial Council's pilot program, however, the district court's order cannot go into effect unless it is approved by Chief Judge Kozinski. Because Chief Judge Kozinski has not yet determined whether to approve the district court's request for authorization to record and publicly distribute the trial proceedings in this case on the Internet, there is no lower-court order for this Court to stay.

When the Ninth Circuit Judicial Council announced the introduction of its pilot program, it explained that cases "to be considered for the pilot program will be selected by the chief judge of the district court in consultation with the chief circuit judge." C.A. App. Ex. 13. In accordance with the terms of the program, the district court notified the parties on January 7, 2010, that it had "formally requested the Chief Judge of the Ninth Circuit to approve inclusion of the trial in the pilot project on the terms and conditions discussed at the January 6, 2010 hearing," which would provide for recording of the trial proceedings for public distribution in an overflow courtroom in the Northern District of

California's San Francisco courthouse and other federal courthouses across the country, and on the Internet. C.A. App. Ex. 1. On January 8, 2010, Chief Judge Kozinski issued an order that granted the district court's request, "*limited to* real-time live streaming to federal courthouses to be designated by the Circuit and Court of Appeals Executive." Supp. App. Ex. 3 (emphasis added). Chief Judge Kozinski explained that the "request for posting the files of the videos on the district court's website is still pending." *Id.*

Because Chief Judge Kozinski has not yet decided whether to approve the district court's request that the trial proceedings be recorded and publicly disseminated on the Internet, it is premature for Proponents to seek a stay of "the district court's order permitting the proceedings in this case to be publicly broadcast on YouTube." Stay App. 25. Unless Chief Judge Kozinski approves the recording and subsequent Internet distribution of the trial proceedings, that public distribution will not take place and the district court's order permitting that distribution will lack all legal force and effect. Accordingly, there is nothing for this Court to stay at this time.

B. There Is No Reasonable Probability That This Court Would Grant Certiorari And Reverse The Court Of Appeals' Denial Of Proponents' Mandamus Petition.

Even if Chief Judge Kozinski were to approve the recording and subsequent Internet distribution of the trial proceedings while Proponents' stay application is pending, the application should still be denied because there is no reasonable probability that this Court would grant certiorari and reverse the court of appeals' decision not to issue a writ of mandamus barring that transmission. In the event that Chief Judge Kozinski approves the recording and public distribution of the trial proceedings on the

Internet, that transmission would be authorized by both the district court's local rules and the policy of the Ninth Circuit Judicial Council, and would not impair Proponents' due process rights.

Proponents do not attempt to satisfy any of the traditional criteria that this Court uses to evaluate whether to grant a petition for a writ of certiorari. Proponents do not even suggest that the Ninth Circuit's denial of mandamus conflicts with the decisions of other circuits or the decisions of this Court. Proponents instead contend that this Court would likely grant their forthcoming petition for certiorari—and reverse the Ninth Circuit's denial of mandamus—as "'an exercise of this Court's supervisory power'" over lower courts. Stay App. 11 (quoting S. Ct. R. 10(a)). But this Court generally exercises its "supervisory power" only when doing so is necessary to "establish[ ] and maintain[ ] civilized standards of procedure and evidence." *McNabb v. United States*, 318 U.S. 332, 340 (1943). Proponents have not demonstrated that the Ninth Circuit's denial of mandamus comes remotely close to presenting the exceptional circumstances that alone justify the exercise of this Court's supervisory power.

Indeed, the Ninth Circuit acted well within its broad discretion, and pursuant to "civilized standards," when it denied Proponents' request for a writ of mandamus prohibiting the recording and subsequent public distribution of the trial proceedings in this case. As this Court has emphasized, mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes" (*Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted)), and its "issuance . . . is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. U.S.*

Dist. Court, 426 U.S. 394, 403 (1976). "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of" mandamus. *Cheney*, 542 U.S. at 380 (internal quotation marks and citations omitted). To demonstrate that these "exceptional circumstances" are present, the party seeking mandamus must establish that the lower court committed "clear and indisputable" error and that it "ha[s] no other adequate means to attain the relief" being sought. *Id.* at 380-81 (internal quotation marks omitted). Proponents cannot make either of those showings in this case.

1. If approved by Chief Judge Kozinski, the district court's decision to record and publicly distribute the trial proceedings in this case would be authorized both by the Ninth Circuit Judicial Council and by the district court's local rules.

On December 17, 2009, the Ninth Circuit Judicial Council announced its decision to establish a pilot program that "allow[s] the 15 district courts within the Ninth Circuit to experiment with the dissemination of video recordings in civil non-jury matters." C.A. App. Ex. 13. Proponents challenge the validity of the Ninth Circuit Judicial Council's pilot program on the ground that the council did not provide a notice and comment period before establishing the program. But judicial councils are required to provide notice and comment only when issuing "general order[s] relating to practice and procedure" within the circuit (28 U.S.C. § 332(d)(1)), and, as Proponents concede, the Ninth Circuit Judicial Council "has not issued" a "general order" authorizing the broadcast of civil non-jury proceedings. Stay App. 23. Instead, it instituted a pilot program that is designed to assist the council in determining whether to issue an order that permanently authorizes the

broadcast of such proceedings. C.A. App. Ex. 13. Proponents point to nothing in 28 U.S.C. § 332 or any other statute that makes notice and comment a prerequisite to the establishment of such programs.

In accordance with the Ninth Circuit Judicial Council's pilot program, the Northern District of California revised its Local Rule 77-3 on December 22, 2009, to provide that, "[u]nless allowed by a Judge or a Magistrate Judge . . . *for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit*, the taking of photographs, public broadcasting or televising . . . in connection with any judicial proceeding[ ] is prohibited." C.A. App. Ex. 19 (revisions italicized). That amendment was validly enacted pursuant to 28 U.S.C. § 2071(e), which provides that, "[i]f the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment." The impending start of the trial in this case on January 11, 2010—and the overwhelming public interest in this case—unquestionably satisfy this "immediate need" provision.[2]

---

[2] Even if the Northern District's amendment of Local Rule 77-3 did not comport with all the procedural requirements of 28 U.S.C. § 2071, the district court certainly did not commit a "clear abuse of discretion" when, in reliance on that amended rule, it requested permission from Chief Judge Kozinski to record the trial proceedings for public distribution in other courtrooms and on the Internet. *Cheney*, 542 U.S. at 380 (internal quotation marks omitted). Proponents locate *not one decision* in which a court of appeals has directed a district court to comply with a superseded local rule on the ground that the process amending that rule was invalid. This case is a far cry from *United States v. Terry*, 11 F.3d 110 (9th Cir. 1993), in which the court reversed the denial of a motion to suppress on the ground that the defendant "received no actual

[Footnote continued on next page]

Under the Ninth Circuit Judicial Council's pilot program and amended Local Rule 77-3, the district court therefore possessed the authority to order the recording and public distribution of the trial proceedings in this case, subject to the approval of Chief Judge Kozinski. And, while it is the position of the Judicial Conference of the United States that cameras should not be permitted in federal district courts, that policy is not binding on the Ninth Circuit or the district court. *See Armster v. U.S. Dist. Court*, 806 F.2d 1347, 1349 n.1 (9th Cir. 1986) ("Except for judicial disciplinary proceedings, the Judicial Conference does not have binding or adjudicatory authority over the courts."). The nonbinding nature of the Judicial Conference's camera policy is confirmed by the fact that both the Southern District of New York and the Eastern District of New York have policies expressly authorizing judges to broadcast civil proceedings. *See* S.D.N.Y. Local Civ. R. 1.8; E.D.N.Y. Local Civ. R. 1.8.[3]

[Footnote continued from previous page]

notice" of a general order that made his motion untimely, but did not invalidate the general order as to those litigants who did have actual notice of it (as Proponents indisputably did here). *Id.* at 113. Indeed, *Terry* recognizes that, "in promulgating local rules, a district court has considerable latitude in calibrating its public notice method to the individual needs of its jurisdiction." *Id.* (internal quotation marks omitted). Moreover, Proponents complain that the opportunity for comment provided by the district court is "patently inadequate" (Stay App. 21), but, as they concede, they were first informed of the possibility that the trial proceedings would be recorded and publicly disseminated in September 2009, and have subsequently made their objections known at every available opportunity and in every available forum. *Id.* at 6.

[3] The Ninth Circuit's denial of mandamus is completely consistent with the First Circuit's decision in *In re Sony BMG Music Entertainment*, 564 F.3d 1 (1st Cir. 2009). In that case, a "controlling" local rule explicitly prohibited broadcast of "any

[Footnote continued on next page]

Proponents are also wrong when they suggest that the recording and public dissemination of the trial proceedings in other courtrooms and on the Internet would impair their due process rights. Stay App. 24. Proponents' concerns about the possibility of compromised safety, witness intimidation, or harassment of trial participants are utterly unsubstantiated and groundless speculation.

As an initial matter, every one of the witnesses that Proponents have indicated they will call at trial is a *paid expert*. But Proponents designated these persons as their experts a week *after* the district court first suggested that it might record and publicly distribute the proceedings and after Plaintiffs had expressed support for such a broadcast. Doc # 160 at 2 (Supp. App. Ex. 6); C.A. App. Ex. 10. Surely, counsel for Proponents informed their paid experts of the possibility that the trial proceedings could be disseminated in other courtrooms and on the Internet, and it seems that those experts nevertheless agreed to testify. Indeed, given the very public profiles of many of Proponents' experts—for example, Proponents' expert David Blankenhorn has published numerous op-eds opposing marriage equality (*see, e.g.*, David Blankenhorn, *Protecting Marriage to Protect Children*, L.A. Times, Sept. 19, 2008), and their expert Loren Marks

---

[Footnote continued from previous page]

proceedings," and the district court's interpretation of that rule to *permit* a broadcast was "palpably incorrect." *Id.* at 4, 5, 10. Here, quite unlike *Sony*, the "controlling" local rule explicitly permits broadcast of civil non-jury trials designated as appropriate by the chief judges of the district court and the Ninth Circuit. Proponents' argument—that the "controlling" local rule was invalidly amended—was not remotely presented in *Sony*.

has a YouTube video discussing marriage (*see* http://www.youtube.com/watch?v=atVTejG6U_U)—it is hard to believe that those experts are not embracing the opportunity to communicate their views to the broadest possible audience. At a minimum, the publicity willingly sought by Proponents' paid experts deeply undermines the suggestion that any additional publicity they may receive as a result of the Internet rebroadcast of the trial proceedings will expose them to threats and harassment they otherwise would not have faced. *See United States v. Criden*, 648 F.2d 814, 825 (3d Cir. 1981) ("when the defendants themselves were public figures and their conduct was already the subject of national publicity and comment, we find the district court's concerns about the incremental effect of rebroadcast publicity to be unconvincing").

Furthermore, to the extent Proponents' concern is for adverse witnesses that Plaintiffs may call, those persons willingly thrust themselves into public view years ago by sponsoring Prop. 8 and orchestrating an expensive, sophisticated, and highly public multimedia campaign to amend the California Constitution. They certainly did not exhibit a similar fear of public attention when attempting to garner votes for Prop. 8 from millions of California voters, when touting their successful campaign strategy in post-election magazine articles and public appearances (*see* Supp. App. Ex. 5; http://www.youtube.com/ watch?v=ngbAPVVPD5k), or when voluntarily intervening in this case. In any event, many aspects of the trial—including opening and closing arguments and testimony by the parties' experts—will not even remotely implicate Proponents' purported witness-related concerns. And, the district court indicated that, should it determine that witness issues or other factors militate against permitting camera

coverage of particular portions of the trial, it can and will limit transmission of those parts of the trial to the public. *See* C.A. App. Ex. 2, at 44-45.

2. In light of the authority granted to the district court by its Local Rules and the Ninth Circuit Judicial Council—and the absence of any factual or legal support for Proponents' due process arguments—the Ninth Circuit correctly concluded that the district court did not err when it requested Chief Judge Kozinski's approval to record and publicly distribute the trial proceedings in other courtrooms and on the Internet. But even if the transmission of the trial proceedings would constitute a "clear and indisputable" violation of either the applicable procedural rules or due process—and it certainly does not—the Ninth Circuit would still have been correct to deny mandamus because Proponents have "other adequate means to attain the relief" being sought. *Cheney*, 542 U.S. at 380, 381 (internal quotation marks omitted).

If, as Proponents allege, the recording and transmission of the trial proceedings would impair their right to a fair trial, Proponents—like any other litigant who has been prejudiced by deficient trial procedures—would have the opportunity to seek full relief on a motion for a new trial and subsequent appeal. Indeed, this Court has expressly held that post-trial review provides litigants with a meaningful opportunity to challenge a court's authorization of cameras during trial proceedings. *See Chandler v. Florida*, 449 U.S. 560, 581 (1981) (holding that television coverage of a criminal trial did not impair defendants' due process rights, while emphasizing that a "defendant has the right *on review* to show that the media's coverage of his case—printed or broadcast—compromised the ability of the jury to judge him fairly") (emphasis added). The

mandamus relief sought by Proponents—and properly denied by the Ninth Circuit—was therefore unnecessary.

C. Proponents Will Not Be Irreparably Harmed In The Absence Of A Stay.

In addition to failing to establish any reasonable likelihood that this Court will grant review, Proponents have failed to demonstrate that they would be irreparably harmed in the absence of a stay.

As explained above, Proponents' assertions that the recording and subsequent public distribution of the trial proceedings would expose Proponents and their paid expert witnesses to threats and harassment are completely unfounded. The identity of Proponents and their experts—and their position on the issues to be litigated in this case—are already well known to the public, and thus the hypothesized risks posited by Proponents would not be materially increased by the recording and transmission of the trial proceedings. And any prejudice that such public dissemination of the proceedings might have upon Proponents' procedural due process rights could be fully remedied on appeal. *Chandler*, 449 U.S. at 581. In light of the absence of any showing of irreparable harm, a stay is not warranted.

D. The Balance Of Equities Weighs Against A Stay.

Finally, the balance of equities weighs against a stay because there is a strong interest in providing the public with meaningful access to the trial proceedings in this exceedingly important case.

Recording and publicly distributing this bench trial in other courtrooms and on the Internet will promote deeply rooted First Amendment principles that favor broad public access to judicial proceedings. Indeed, this Court has recognized that a "trial is a public event" and that "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Because "it is difficult for [people] to accept what they are prohibited from observing" (*Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980) (op. of Burger, C.J.)), the First Amendment guarantees free and open access to judicial proceedings in order to foster public confidence in the judicial system. Broad public access to judicial proceedings also "protect[s] the free discussion of governmental affairs" that is essential to the ability of "the individual citizen . . . [to] effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (internal quotation marks omitted).

In light of the great public interest in the issues to be decided in this case, providing a broadcast of the proceedings is the most effective means of affording the public its constitutionally guaranteed right of access. More than 13 million Californians cast a vote for or against Prop. 8. And there are hundreds of thousands of gay and lesbian Californians who have a direct stake in the outcome of this case. Far from detracting

from the right of public access, the "highly contentious" character of the issues to be resolved in this case (Stay App. 24) underscores the importance of providing the public with a meaningful window into the trial proceedings so it can see and hear what is happening in the courtroom. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed"). The "ability to see and to hear a proceeding as i[t] unfolds is a vital component of the First Amendment right of access." *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004).

III. CONCLUSION

For the foregoing reasons, the Application for Immediate Stay should be denied.

Respectfully submitted.

/s/ Theodore B. Olson

THEODORE J. BOUTROUS, JR.
THEANE EVANGELIS KAPUR
ENRIQUE A. MONAGAS
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7804

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

January 10, 2010

Supreme Court, U.S.
FILED
JAN 10 2010
OFFICE OF THE CLERK

Supreme Court, U.S.
FILED
JAN 10 2009
OFFICE OF THE CLERK

NO. 09A648

IN THE UNITED STATES SUPREME COURT

IN RE: DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANNSON, AND PROTECT-MARRIAGE.COM—YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

DENNIS HOLLINGSWORTH, et al.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

KRISTEN M. PERRY, SANDRA B. STIER, PAUL K. KATAMI, JEFFREY J. ZARRILLO, CITY AND COUNTY OF SAN FRANCISCO, NON-PARTY THE MEDIA COALITION, ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, EDMUND G. BROWN, JR., in his official capacity as Attorney General of California, MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics, LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda, DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, and HAK-SHING WILLIAM TAM,
Real Parties in Interest.

On Appeal from the United States District Court
for the Northern District of California

OPPOSITION BY NON-PARTY MEDIA COALITION TO APPLICATION FOR IMMEDIATE STAY OF THE DISTRICT COURT'S ORDER PERMITTING PUBLIC BROADCAST OF TRIAL PROCEEDINGS

THOMAS R. BURKE
Counsel of Record
ROCHELLE L. WILCOX
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, California 94111
(415) 276-6500; (415) 276-6599 fax

Attorneys for Non-Party Media Coalition ABC NEWS; KGO TV; KABC TV; CABLE NEWS NETWORK; IN SESSION (formerly known as "COURT TV"); FOX NEWS; NBC UNIVERSAL, INC.; CBS NEWS; HEARST CORPORATION; DOW JONES & COMPANY, INC.; THE ASSOCIATED PRESS; and NORTHERN CALIFORNIA CHAPTER OF RADIO & TELEVISION NEWS DIRECTORS ASSOCIATION

TABLE OF CONTENTS

PETITIONERS' BURDEN TO OBTAIN RELIEF FROM THIS COURT IS EXTREMELY HIGH 1

THE APPLICATION SHOULD BE DENIED BECAUSE NO APPEALABLE ORDER HAS BEEN ISSUED 2

THE DISTRICT COURT CAREFULLY BALANCED THE COMPETING INTERESTS IN DECIDING TO PERMIT BROADCAST OF THIS VITALLY IMPORTANT TRIAL 4

THE NINTH CIRCUIT JUDICIAL COUNCIL CAREFULLY WEIGHED THE BENEFITS OF CAMERA ACCESS AGAINST THE CLAIMED DETRIMENTS 9

A. Numerous Courts Have Recognized the Benefit of Public Access. 10

B. The First Amendment Presumptive Right In Favor Of Full Public Access To Judicial Proceedings Also Supports Electronic Access To Entire Trials. 13

C. The Purported Problems Of Camera Access Are Easily Remedied, Or Illusory. 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Chandler v. Florida,
449 U.S. 560 (1981) 18

Craig v. Harney,
331 U.S. 367 (1947) 13

Estes v. Texas,
381 U.S. 532 (1965) 17, 18

Globe Newspaper Co. v. Superior Court,
457 U.S. 596 (1982) 15

In re Petition of Post-Newsweek Stations, Inc.,
370 So.2d 768 (Fla. 1979) 16

Katzman v. Victoria's Secret Catalogue,
923 F. Supp. 580 (S.D.N.Y. 1996) 19

National Park Hospitality Assn. v. Dept. of Interior,
538 U.S. 803 (2003) 3

Nebraska Press Ass'n v. Stuart,
427 U.S. 539 (1976) (Brennan, J. concurring) 15

Press Enterprise v. Superior Court
("*Press Enterprise II*"), 478 U.S. 1 (1986) 11

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) ..... passim

Rostker v. Goldberg,
448 U. S. 1306 (1980) (Brennan, J., in chambers) 1

United States v. Antar,
38 F.3d 1348 (3d Cir. 1994) 12

OTHER AUTHORITIES

Civil Local Rule 77-3 9

Hearings Before a Subcm. Of the House Comm. on Appropriations, 104th Congress, 2d Sess. 30 (1996) 10

First Amendment ..... passim

Sixth Amendment 6

ABC News, KGO TV, KABC TV, Cable News Network, In Session (formerly known as "Court TV"), Fox News, NBC Universal, Inc., CBS News, Hearst Corporation, Dow Jones & Company, Inc., The Associated Press, and the Northern California Chapter of the Radio & Television News Directors Association (the "Media Coalition") respectfully submit this Opposition to the "Application for the Immediate Stay of the District Court's Order Permitting Public Broadcast of Trial Proceedings" (the "Application"). Petitioners' Application is not ripe and does not satisfy the high standard required to grant the relief they seek.

PETITIONERS' BURDEN TO OBTAIN RELIEF

FROM THIS COURT IS EXTREMELY HIGH

Relief in in-chambers stay applications such as this one should be granted only in "extraordinary cases"; denial of such applications is the norm. *Rostker v. Goldberg*, 448 U. S. 1306, 1308 (1980) (Brennan, J., in chambers). To obtain relief, the applicant must demonstrate (1) "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) a likelihood that "irreparable harm [will] result from the denial of a stay." *Ibid.* Petitioners cannot satisfy any of these requirements, much less all of them.

The Order issued by the district court, the Honorable Chief Judge Vaughn Walker presiding, is well within that court's authority and discretion, and consistent with the unanimous decision by the Judicial Council of the Ninth Circuit to adopt a pilot program permitting camera access to certain federal proceedings. It is no wonder that the Ninth Circuit rejected Petitioners' request for a writ of mandamus: the Judicial Council's decision to create the pilot program followed years of consideration and analysis of the issue. Petitioners have not met their high burden to obtain extraordinary relief from this Court. The Media Coalition urges the Court to deny the Application, and permit camera access to the trial at issue here, for the reasons set forth below.

THE APPLICATION SHOULD BE DENIED BECAUSE NO APPEALABLE ORDER HAS BEEN ISSUED

Petitioners note in their Application that at the time they filed the Application, "there [was] no record that Chief Judge Kozinski ha[d] yet acted" on the request to permit remote viewing and/or internet streaming of the trial at issue here. Application at 2. Yet by the time this Application was filed, Judge Kozinski had indeed acted on part of the district court's request to "permit audio-video recording and transmission of pre-trial proceedings and trial" in this matter, agreeing to permit "real-time live streaming to federal courthouses ... and subject to such procedures and limitations as the district judge presiding over the case may

deem appropriate." Non-Party Media Coalition's Appendix in Support of Opposition to Application for Immediate Stay of the District Court's Order Permitting Public Broadcast of Trial Proceedings ("MC Appendix"), Tab 1. Decidedly however, Judge Kozinski has not yet acted on "[t]he request for posting the files of the videos on the district court's website," which "is still pending." *Id.*

Seen in this light, Petitioners' concerns, as expressed in the Application, are only with the district court's tentative decision to allow the video and sound recordings of the trial proceedings, that the court is prepared to publicly disseminate through the Internet. Application at 2, 4. Petitioners have expressed no opposition to the decision to stream the trial proceedings live to other courthouses. Indeed, when the district court announced months ago that cameras would be placed in the courtroom during this trial, Petitioners voiced no objection to that decision, nor do they challenge it in this Application. And Petitioners have never argued that the trial, or any part of it should be closed to the public. Trial witness lists have been exchanged and are publicly available through the court and its website; all of the trial proceedings at issue here will be open to the public. Because Petitioners' only challenge is to the public broadcast of the proceedings that they accept will be open to the public, their Application is not yet ripe, and the Court should deny it for that reason alone. *National Park Hospitality Assn. v. Dept. of Interior*, 538 U.S. 803 (2003).

THE DISTRICT COURT CAREFULLY BALANCED THE COMPETING INTERESTS IN DECIDING TO PERMIT BROADCAST OF THIS VITALLY IMPORTANT TRIAL

The trial proceedings scheduled to begin Monday involve a federal constitutional challenge to California's Proposition 8, which banned same-sex marriage – an issue of profound interest to millions of individuals throughout California, the nation and the world. As both the Ninth Circuit and the district court recognized, this civil bench trial presents an ideal opportunity for the Court to test its new policy and allow camera coverage of these proceedings, because it involves important constitutional issues on a matter of substantial public interest – whether California's constitutional amendment (Proposition 8) prohibiting same sex couples from marrying violates the due process and equal protection clauses of the federal Constitution.

Petitioners complain about the purported "haste" to amend the Ninth Circuit and district court rules, to allow camera access in this case. They ignore that this issue has been considered by the Ninth Circuit for years, and that the Ninth Circuit's Judicial Council unanimously approved the pilot program. The experienced district court judge who will oversee this trial understands the issues presented in this case, has overseen the unique discovery issues that have arisen, and fully appreciates the tremendous significance of the constitutional questions

the court is asked to decide. He decided after careful consideration of the competing interests that it is vital that these trial proceedings be broadcast, and for good reason.

The district court's decision to allow camera coverage of these historic trial proceedings will permit everyone interested to see, first hand, the trial of this social issue of the day. By accommodating the public's substantial interest in observing these trial proceedings, including the evidence offered by both sides, the district court will enhance the legitimacy of the decision ultimately rendered in this case. In deciding that this case should be the first trial in the Ninth Circuit's pilot program to have camera access, the district court appropriately acknowledged the tremendous public significance of this case. If camera access is ever appropriate – and it is – it is the high profile case, like this one, in which it is most important. The First Amendment mandates that the public be allowed to observe, so that it can understand, what occurs in the courtroom. The district court's decision permits the millions of people interested in this proceeding to view what actually occurs, so that they can better understand and accept the decision that the district court will make.

For this reason, Petitioners' repeated invocation of Judge O'Scannlain's concern for "individual litigants in individual cases" is completely misplaced. Application at 17, 23. This is not the typical case, in which the parties are fighting

about their own rights to money or property. The parties are fighting about the validity of a controversial amendment to California's Constitution. Petitioners will not be directly impacted by any decision in this case, and their individual rights are not at issue. Plaintiffs, whose rights are directly at issue, support the district court's decision to permit camera coverage of these proceedings. The individuals whose rights are directly at issue – the gays and lesbians who oppose Proposition 8 – should be permitted to see for themselves the trial proceedings that culminate in the decision that will control their rights.

In contrast to the enormous public interest in this matter, the parties opposing broadcast of these proceedings have advanced only illusory countervailing interests, and nothing that would justify barring cameras from this trial. This is not a criminal trial that implicates Sixth Amendment rights, nor is there any concern about jury taint in this bench trial.

Petitioners' primary argument is that their witnesses fear broadcast of their testimony. Application at 15. They go so far as to claim that all of their witnesses "have expressed concern over the potential public broadcast of trial proceedings." *Id.* They point to harassment and reprisals against supporters of Proposition 8, and argue that their witnesses fear the same reaction to their testimony. *Id.*; *see also* Appendix, Exhibit 12 at 2-3. But any witnesses will be testifying in open public court at the trial with heavy accompanying publicity in the print and electronic

media. If the purported harms identified by Petitioners exist at all, they will flow from the witnesses' mere participation in the trial. Their names and testimony will be available for all the world to see, as the witness list already is available through the district court's website and the trial transcripts also will be publicly available. Any opprobrium due to their participation in this trial will happen regardless of whether the trial is publicly available over the Internet or otherwise.

Petitioners demand secrecy on their terms. Yet, they voluntarily intervened in this contentious lawsuit to defend Proposition 8. Petitioners have not claimed that any of their witnesses are being compelled to testify; it appears that each is voluntarily participating in the trial to lend their support to this cause. Petitioners do not oppose public access, or argue that Petitioners or their witnesses must testify anonymously. Petitioners' concern is with the incremental additional publicity that will flow from the public dissemination of these trial proceedings over the Internet. Yet the harms they claim to fear flow from their decision to intervene in this proceeding, and the decisions of their witnesses to testify in support of Proposition 8. Having voluntarily chosen to inject themselves into this highly contentious judicial proceeding, they cannot now demand that they be allowed to hide from the public eye.

Moreover, Petitioners' arguments here stand in stark contrast to the very public support for Proposition 8 that preceded its enactment by California's voters,

as discussed by Plaintiffs in their separately-filed brief. Petitioners want to support this important, divisive issue – which will directly affect tens of thousands of people in California – but prevent the public from seeing for themselves whatever testimony and evidence Petitioners' witnesses may offer during this public trial.

In the end, it is important to understand what Petitioners urge here. Petitioners ask this Court to conclude that *as a matter of law*, camera access cannot be permitted in these proceedings. They ask the Court to reject the careful consideration of the competing interests by the district court presiding over this case, and conclude that the court had *no discretion* to permit camera access. The relief Petitioners seek is extreme; they have failed to meet their burden of demonstrating that the district court abused its broad discretion in deciding to permit broadcast, under the court's careful supervision, of the public trial proceedings here.

Each of the issues raised in the Application was presented to and carefully considered by the district court. The court announced a nuanced approach to allowing camera access designed to accommodate each of Petitioners' concerns. Petitioners claim that they fear a "media circus," reiterating in this Court their same concerns about witness intimidation, raised below. In doing so, they grossly underestimate the ability of this experienced district court judge to exercise his inherent powers, and expressed willingness to take all appropriate steps to protect

participants involved in this proceeding. There has been no showing in this case that any exceptional circumstances are present that require this Court's intervention to prohibit the public from viewing through the media, what transpires in open court.

THE NINTH CIRCUIT JUDICIAL COUNCIL CAREFULLY WEIGHED THE BENEFITS OF CAMERA ACCESS AGAINST THE CLAIMED DETRIMENTS

On December 17, 2009, the Judicial Council of the Ninth Circuit voted unanimously to permit district courts within the circuit to experiment with the video recording of some proceedings in civil non-jury cases. Appendix, Exh. 13 at 1. In announcing this experiment, Chief Judge Alex Kozinski stated that the Judicial Council of the Ninth Circuit "hope[s] that being able to see and hear what transpires in the courtroom will lead to a better public understanding of our judicial processes and enhanced confidence in the rule of law." *Id.* On December 22, 2009, Local Rule 77-3 was amended to allow the use of cameras in civil cases approved under test programs. *See* Civil Local Rule 77-3 (providing that "[u]nless allowed by a Judge or a Magistrate Judge ... *for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit*, the taking of photographs, public broadcasting or televising ... in connection with any judicial proceeding[] is prohibited." (Revisions emphasized.). Accordingly, the district

court acted well within its discretion and consistent with the many cases that have recognized that trial courts should have the discretion to permit camera access.

A. Numerous Courts Have Recognized the Benefit of Public Access.

The dozens of decisions during the modern era that consistently have expanded the public's rights to obtain information about trials and the judiciary have rested on the public's "right to observe the conduct of trials." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (emphasis added). This right of observation guarantees not just that members of the public may visit courtrooms, but that all members of the public have the right to view trials. *See id.* at 594 (Brennan, J. concurring) (citing *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.) ("It is desirable that the trial of causes should take place under the public eye [so that] every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed")).

As this Court told Congress, in discussing whether electronic access of court proceedings should be permitted:

> You can make the argument that the most rational, the most dispassionate, the most orderly presentation of the issue is in the courtroom, and it is the outside coverage that is really the problem. In a way, it seems perverse to exclude television from the area in which the most orderly presentation of the evidence takes place.

Hearings Before a Subcm. Of the House Comm. on Appropriations, 104th Congress, 2d Sess. 30 (1996).

In the fifteen years since this statement was made, the Court's prescience and insight certainly has proven true. If there is a public benefit to public trials – and there is – then there also is a public benefit to complete access to public trials. Two hundred years ago, the court accommodated the public's interest in court proceedings by moving high profile proceedings to a larger building. As the Supreme Court noted in *Press Enterprise v. Superior Court* ("*Press Enterprise II*"), 478 U.S. 1, 10 (1986), the probable cause hearing in the Aaron Burr trial "was held in the Hall of the House of Delegates in Virginia, the courtroom being too small to accommodate the crush of interested citizens." Through the use of cameras in the courtroom and the Internet, today's technology affords a much easier way to provide access to members of the public who are interested in following this important case, in which the Court is asked to decide the constitutionality of California's constitutional ban prohibiting same sex couples from marrying.

In *Richmond Newspapers*, 448 U.S. at 573, this Court noted that "[i]nstead of acquiring information about trials by first hand observation or by word of mouth from those who attend, people now acquire it chiefly through the print and electronic media." 448 U.S. at 573. The Court explained that this development "validates the media claim of functioning as surrogates for the public." *Id.* at 573. Full media access to judicial proceedings is especially important given the pace of

modern life and the size of our metropolitan areas. With the myriad commitments and responsibilities that each person faces on a daily basis, there is simply no time to attend judicial proceedings in person.

While an individual may be available to attend trial proceedings, the sheer number of such interested observants in cases like this one guarantees that only a small fraction could be admitted at any given time. Even with the overflow courtrooms announced to accommodate the extraordinary public interest in these proceedings, there remains limited physical space. These physical limitations have not been lost on courts and legislatures that have considered the issue. As a committee of the California Legislature recognized in 1967, long before technological advances permitted the unobtrusive recording of court proceedings, because "sprawling urbanism has replaced concentrated ruralism," and because "no courtroom in the land could hold even a minute fraction of the people interested in specific cases, ... a trial is not truly public unless news media are free to bring it to the home of the citizens by newspaper, magazine, radio, television or whatever device they have." Similarly, the Third Circuit acknowledged the practical obstacles that prevent full public attendance at trials, asking rhetorically, "What exists of the right of access if it extends only to those who can squeeze through the [courtroom] door?" *United States v. Antar*, 38 F.3d 1348, 1360 (3d

Cir. 1994). In other words, a courtroom is open only in theory when the general public has no opportunity to view the events transpiring therein.

The ability to show the public exactly what happens in the courtroom is a crucial component of news coverage in the digital age. As Justice Marshall observed in *Richmond Newspapers*, "[i]n advancing the [] purposes [of open judicial proceedings], the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the 'cold' record is a very imperfect reproduction of events that transpire in the courtroom." 448 U.S. at 597 n.22 (Marshall, J., concurring). To enable the media to perform its surrogate function most effectively, the maximum amount of information must be available to the public. The most effective means of making accurate, objective information available is by allowing cameras in court.

B. The First Amendment Presumptive Right In Favor Of Full Public Access To Judicial Proceedings Also Supports Electronic Access To Entire Trials.

This Court long has recognized that a trial is a "public event." *Craig v. Harney*, 331 U.S. 367, 374 (1947). In 1980, the Court reaffirmed this principle, finding that the press and the public have a constitutional right to observe trials, absent compelling and clearly articulated reasons for closing such proceedings. *Richmond Newspapers*, 448 U.S. at 580. As the Court stated, "[T]he appearance of justice can best be provided by allowing people to observe it." *Id.* at 571. The

Court noted that the strong historical tradition in Western jurisprudence in favor of public observation of trials is a practice that predates the Norman Conquest. *Id.* at 565.

This tradition of public access assumes even greater importance in our democratic system, where the government and all of its actions ultimately are held accountable by the voters. "People in an open society do not demand infallibility from their institutions," the Court concluded, " but it is difficult for them to accept what they are prohibited from observing." *Id.* at 572. For these reasons, the Court noted that "historically both civil and criminal trials have been presumptively open" to the public. *Id.* at 580 n.17 (emphasis added); *see also id.* at 598 (Stewart, J. concurring) (stating that "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal").

The concept of observation – that members of the public ought to be allowed to see for themselves public trials – is a cornerstone of the constitutional right recognized in *Richmond Newspapers*. As Chief Justice Burger stated in tracing our historical tradition of open proceedings, "part of the very nature of a criminal trial was its openness to those who wished to attend." *Id.* at 568. Members of the community always possessed the "right to observe the conduct of trials." *Id.* at 572. Through cameras in the courtroom, citizens again have a meaningful

opportunity to exercise their constitutional right to observe trials. For that right to have meaning, the First Amendment right of access should include, at a minimum, a right for the court overseeing a trial to conclude, in its broad discretion, that public access to the trial will further these important constitutional principles.

The purposes of the constitutional rights to attend and observe trials are well established, and are promoted by the use of cameras in the courtroom. Not only does public observation of trials educate the public about the rule of law and the functioning of the justice system, it also serves to reinforce public acceptance – crucial in a democratic society – of "both the process and its results." *Id.* at 571. As Justice Brennan declared:

> Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding to the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J. concurring). Similarly, in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982), the Court emphasized that public access to court proceedings allows "the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government."

Allowing camera coverage of these trial proceedings will ensure that the public has the most complete and accurate account of these proceedings. Without question, the trial will be the subject of intense publicity regardless of whether cameras are used in the courtroom. As the Florida Supreme Court acutely observed, "newsworthy trials are newsworthy trials, and ... they will be extensively covered by the media both within and without the courtroom," whether or not cameras are permitted. *In re Petition of Post-Newsweek Stations, Inc.*, 370 So.2d 768, 776 (Fla. 1979). Written reports on trials can and do provide thoughtful, accurate and detailed accounts of what transpires in the courtroom. Through allowing electronic coverage of the actual testimony in the courtroom, the Court can ensure that the public receives a complete account of the proceedings. Since citizens will judge the proceedings with whatever information they possess, public understanding will be enhanced by allowing all interested members of the public to observe through cameras what actually takes place in the trial concerning the constitutionality of Proposition 8, consistent with the public and the media's presumptive right of access to judicial proceedings.

Just as the chronicles of the trial concerning the teaching of evolution in schools riveted the country in the 1920s, allowing camera coverage of this trial will provide viewers with a national civics lesson concerning the role of the independent federal judiciary in its constitutional review of the hotly contested

issue of same-sex marriage – an issue that crosses social, political, educational, and religious boundaries. The California Supreme Court recently permitted live camera coverage of the oral argument on the state constitutional challenge to Proposition 8, allowing millions to observe its proceedings. Many other courts have permitted the media to broadcast newsworthy judicial proceedings, including the Florida Supreme Court during the *Bush v. Gore* Florida recount. The recognition of these courts of the public's right of access to televised proceedings of these high profile legal proceedings has greatly enhanced the ability of the public to observe what transpires in the public courtroom and has demystified the judicial process for millions of people.

C. The Purported Problems Of Camera Access Are Easily Remedied, Or Illusory.

The public benefits achieved by allowing electronic camera access to these trial proceedings will further the fairness and efficiency of the proceedings. It has been nearly four decades since this Court overturned a conviction based on the "considerable disruption" of early-model television equipment, the precedent repeatedly cited by Petitioners. *See Estes v. Texas*, 381 U.S. 532, 536 (1965). Even then, Justice Harlan, the dispositive concurring vote, recognized that the day might come when "television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the

constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause." *Id.* at 595–96 (Harlan, J., concurring).

Justice Harlan's prescience was vindicated in 1981, when a unanimous Supreme Court held that televising a trial – over the objections of two criminal defendants – was not a violation of their due process rights. *Chandler v. Florida*, 449 U.S. 560, 576 (1981). Chief Justice Burger's opinion emphasized that *Estes* had not established a rule banning states from experimenting with an "evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964 . . ., and is, even now, in a state of continuing change." *Id.* at 560. The unanimous *Chandler* opinion also observed that "the data thus far assembled was cause for some optimism about the ability of states to minimize the problems that potentially inhere in electronic coverage of trials." *Id.* at 576 n.11. Therefore, in roughly fifteen years the technological advance that Justice Harlan had anticipated made televised coverage of trials acceptable as a matter of this Court's precedent.

Now, almost thirty years after *Chandler*, further technological progress has removed any doubt that cameras can be present in the courtroom without any concomitant disruption. It is not surprising, therefore, that several lower courts recently have had little trouble distinguishing *Estes*, noting that the Court in that

case "explicitly recognized that its holding ultimately relied on the then-state of technology[.]" *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 589 (S.D.N.Y. 1996). As that court noted, because of "advances in technology, the old objections to cameras in the courtroom – that they were obtrusive and would disrupt the trial – "should no longer stand as a bar to a presumptive First Amendment right of the press to televise ... court proceedings, and of the public to view those proceedings on television." *Id.*

Indeed, any concerns about the adverse impact of full-time camera coverage are belied by the research conducted in various states, including California, which have reached virtually identical conclusions concerning the impact – or lack of impact – on trial participants from the presence of cameras. At least a dozen states – including Arizona, California, Florida, Hawaii, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New York, Ohio, and Virginia – have studied the potential impact of electronic media coverage on courtroom proceedings, particularly focusing on the effect cameras have upon courtroom decorum and upon witnesses, attorneys and judges. MC Appendix, Tab 3 at Exh. C at 38-42. The results from the state studies were unanimous: the claims of a negative impact from electronic media coverage of courtroom proceedings – whether civil or criminal – are baseless. *Id.* For example, the state studies

revealed that fears about witness distraction, nervousness, distortion, fear of harm, and reluctance or unwillingness to testify were unfounded. *Id.*

California's 1981 report on the effect of electronic coverage of court proceedings is one of the most comprehensive of the state evaluations that have been completed. MC Appendix, Tab 3 at Exh. D. The California study included observations and comparisons of proceedings that were covered by the electronic media, and proceedings that were not. *Id.* Not only did California's survey results mirror those of other states – finding that there was no noticeable impact upon witnesses, judges, counsel, or courtroom decorum when cameras were present during judicial proceedings – the "observational" evaluations completed in California further buttressed these results. *Id.* For example, after systematically observing proceedings where cameras were and were not present, consultants who conducted California's study concluded that witnesses were equally effective at communicating in both sets of circumstances. *Id.* Not surprisingly, the California study also revealed that there was no, or only minimal, impact upon courtroom decorum from the presence of cameras. *Id.*

The positive results of the state court evaluations were further bolstered by the Federal Judicial Center's 1994 study of a three-year pilot program that permitted electronic media coverage in civil proceedings in six federal district courts and two circuit courts. MC Appendix, Tab 3 at Exh. C. The federal study

concluded that no negative impact resulted from having cameras in the courtroom. *Id.* Thus, the extensive empirical evidence that has been collected on the impact of electronic coverage consistently has concluded that such coverage is not detrimental to the parties, to witnesses, to counsel, or to courtroom decorum. *Id.*

These empirical studies support the Ninth Circuit's decision to experiment with allowing federal district courts to allow camera coverage of civil, non-jury trials. Petitioners' concerns about "privacy" are wholly undermined by the reality that all witnesses at the trial will be testifying publicly in open court, and will be the subject of intense media attention regardless of whether the proceedings are available through the Internet and other media.

CONCLUSION

Petitioners' Application is not ripe and none of their arguments warrant this Court's intervention to grant the extraordinary relief sought here. The concerns of the participants and the widespread public interest in these legal proceedings are appropriately addressed by the district court's Order and consistent with the Ninth Circuit's pilot program.

The Media Coalition, therefore, respectfully requests that the Court deny the Application to Stay.

RESPECTFULLY SUBMITTED this 10th day of January, 2010.

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
ROCHELLE L. WILCOX

By /s/ Thomas R. Burke
Thomas R. Burke

Attorneys for Non-Party Media Coalition ABC NEWS; KGO TV; KABC TV; CABLE NEWS NETWORK; IN SESSION (formerly known as "COURT TV"); FOX NEWS; NBC UNIVERSAL, INC.; CBS NEWS; HEARST CORPORATION; DOW JONES & COMPANY, INC.; THE ASSOCIATED PRESS; and NORTHERN CALIFORNIA CHAPTER OF RADIO & TELEVISION NEWS DIRECTORS ASSOCIATION

DWT 13821573v3 0050033-000655